No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.
(a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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I.

STATEMENT OF THE CASE.

Alleging that the proceeds of several foreign drafts, previously deposited with appellant, Wells Fargo Bank & Union Trust Co., for collection by Richfield Oil Company of California, had been improperly applied by appellant to the partial satisfaction of the general indebtedness of the Oil Company to it, William C. McDuffie, as receiver of Richfield Oil Company, appellee and respondent herein, commenced this action to recover said proceeds and prosecuted it to Judgment against appellant in the sum of One Hundred Forty-four Thousand Two Hundred Eighty-

nine and 73/100 Dollars together with interest to the date of judgment in the sum of Nineteen Thousand and Sixteen and 12/100 Dollars.

Broadly, the questions which this appeal presents are (1) whether under all the circumstances appellant was vested either with a contractual lien or a banker's lien, or both, upon the drafts in question, the existence of which would sustain the appropriation of the proceeds of the drafts as aforesaid, and (2) whether if such lien existed the bank had by agreement or conduct waived it, or was otherwise estopped to assert the same. The lower Court held, erroneously appellant submits, that the bank was not thus vested with the lien claimed by it, and furthermore that, if such lien existed, appellant had waived it.

(a) Facts.

On July 12, 1930, Richfield Oil Company of California became indebted to appellant in the sum of $625,000.00 on a promissory note payable ninety days after date with interest at 6% per annum. Said note, at the time of its execution, was unsecured.

On October 6, 1930, Richfield Oil Company completed negotiations with appellant for the transfer of its foreign banking business to appellant from another bank, with the facilities of which it had become dissatisfied. These negotiations were conducted in behalf of Richfield by the Manager of its Foreign Department, Robert L. Hall, who appeared as a witness for appellee on the trial of this action; and in behalf of appellant mainly, but not exclusively, by

the Assistant Manager of its Foreign Department, William G. Gilstrap, who testified for appellant at the trial.

At the time of the transactions herein involved Richfield Oil Company was engaged extensively in the shipment of its products to customers in foreign countries. A search for better facilities for the collection of its drafts drawn upon these customers ultimately brought it into negotiation with appellant. To this end, Mr. Hall made three trips from Los Angeles to San Francisco where he conferred with Mr. Gilstrap and other officials of Wells Fargo Bank & Union Trust Co. The probative facts and circumstances surrounding these trips will be discussed in the argument hereinafter set forth.

Since Richfield was interested in receiving advances of credit based on its foreign drafts, rather than in simply depositing the drafts for collection, it was offered a choice between the discount and the acceptance credit method of handling draft collections. The latter method carried a saving in collection and interest charges as compared with the discount method. Therefore the parties finally determined that the foreign draft collection business of Richfield Oil Company with appellant should be done on an acceptance basis.

The mechanics of the acceptance method differ from those involved in the ordinary draft collection transaction in that the customer of the bank first executes an acceptance agreement which specifies a sum up to which the customer may draw upon the bank by

means of acceptances based upon drafts deposited for collection. Thereafter, when the customer deposits drafts for collection, he draws acceptances (drafts) on the bank in amounts agreed upon, based upon the drafts, and the bank advances to the customer the amount of the acceptances less the interest which it has calculated will accrue during the period prior to the maturity of the acceptances. The bank accepts the acceptances (drafts), thereafter selling them in the open market to persons interested in that type of commercial paper. When the acceptances mature according to their terms, the bank pays the holders thereof, and reimburses itself from the proceeds of the drafts which have been deposited as aforesaid. In the event there should be no proceeds of drafts on hand at that time, the bank looks to the drawer of the acceptances for reimbursement.

Such an acceptance agreement in favor of appellant was executed by Richfield Oil Company (R. 252, 253, 254, 255, 256, 257), and on the 6th day of October, 1930, was delivered to appellant by Mr. Hall. The amount specified in this agreement up to which Richfield Oil Company was entitled to draw acceptances on appellant, was $150,000.00.

Among the foreign customers of Richfield at that time was the firm of Birla Bros. Ltd., in Calcutta, India. Each shipment from Richfield Oil Company to this firm customarily would go forward under two drafts, each in the amount of one-half of the purchase price of the shipment, but one of which would be payable at sight and one payable at 180 days after

sight. When the shipment would arrive, Birla Bros. would pay the amount of the sight draft and accept the 180 day draft, thereby becoming entitled to the shipping documents which enabled it to obtain delivery of the goods.

On October 8, 1930, Mr. Hall personally presented to appellant two sets of drafts (R. 267, 270), each drawn against separate shipments to Birla Bros. Ltd. A letter of transmittal (R. 266, 268), personally delivered to appellant by Mr. Hall, accompanied each set of drafts. Each of the drafts covering one of the shipments was in the face amount of $63,950.00, and each of the drafts covering the other shipment was in the face amount of $55,900.75. In each set of drafts one thereof was payable at sight and one thereof at 180 days sight, so that there was a total of $119,850.75 in sight drafts and an equal amount of 180 day drafts deposited at that time. Upon the delivery of these drafts, appellant accepted nine acceptances in the total sum of $115,000.00. Each acceptance bore a maturity of 90 days after date. A deposit of said sum of $115,000.00 was immediately made in appellant bank in favor of Richfield Oil Company and against which Richfield was enabled to draw as it saw fit.

From the time of the presentation of these drafts drawn on Birla Bros. on October 8, 1930, until January 15, 1931, the date upon which appellee was appointed receiver for Richfield Oil Company, a great number of drafts drawn on customers of Richfield located in foreign countries were deposited with appellant for collection. By November 28, 1930, Rich-

field Oil Company had drawn acceptances on appellant in the total sum of $155,000.00, the extra sum of $5000.00 over and above the amount specified in the acceptance agreement having been covered by the execution of an additional acceptance agreement in the sum of $5000.00. (R. 289.) After November 28, 1930, no further acceptances were drawn.

On December 16, 1930, the sum of $119,512.54, representing the net proceeds of the two hereinbefore mentioned sight drafts drawn on Birla Bros. Ltd. were received by appellant. These proceeds were immediately applied to the payment of the first set of acceptances in the sum of $115,000.00 in anticipation of the maturity thereof.

Thereafter appellant continued to receive the proceeds of drafts which had been deposited as aforesaid, and to apply such proceeds to the payment of acceptances. On February 26, 1931, the last of the unpaid acceptances matured and was satisfied from the proceeds of drafts so collected. Thereafter the proceeds of several drafts which were still outstanding were collected by appellant and were deposited to the credit of appellee in his account with the bank.

On May 8, 1931, the sum of $119,850.75, representing the proceeds of the 180 day Birla Bros. drafts hereinbefore mentioned was received by appellant. Thereupon appellant took the action which precipitated the controversy involved herein. Richfield Oil Company was then in receivership. As previously stated, appellant was a creditor of Richfield to the extent of $625,000.00 represented by a matured note,

unsecured by mortgage or any specific pledge of collateral. Each of the acceptance agreements however contained the following provision:

> "All bills of lading, warehouse receipts, and other documents of title and all money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted. * * *"
>
> (R. 253.)

> "In case of any sale or other disposition of the whole or any part of the security or property aforesaid, you may apply the proceeds of such sale or disposition to the payment of all legal or other costs and expenses of collection, sale and delivery and of all expenses incurred in protecting the security or other property or the value thereof, as hereinafter provided and may apply the residue of such proceeds to the payment of this or of any then existing liability of ours to you whether then payable or not * * *."
>
> (R. 255, 256.)

At this time the California Civil Code provided (and still provides):

> "A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."
>
> *Civil Code,* §3054.

Relying upon the foregoing provisions of the acceptance agreement and the law with respect to the lien of bankers and the right of offset, appellant

applied the said proceeds of the 180 day Birla Bros. drafts to the partial satisfaction of the general indebtedness of Richfield Oil Company to it.

Appellee disputed the right of appellant to make this application of the proceeds of said drafts, claiming that the two 180 day sight drafts drawn on Birla Bros. were not deposited with appellant under and subject to the acceptance agreement, and therefore that the contractual lien, which otherwise would have been conferred upon appellant by the above-quoted provisions of the acceptance agreement, was non-existent. Appellee based this conclusion mainly upon the refusal of appellant to issue acceptances in a sum over and above the amount of the sight drafts drawn on Birla Bros., considering only the amount of the sight drafts in determining that the sum of $115,000.00 evidenced by acceptances in that amount, would be advanced against the shipment. Appellee's further claim that appellant was not entitled to a banker's lien was based upon a statement alleged to have been made by Mr. Hall to officers of the appellant during the negotiations for the transfer of Richfield's foreign business to appellant to the effect that all transactions of the Foreign Department of Richfield Oil Company should be kept separate and apart from all other financial transactions and affairs of Richfield with appellant. Appellee's position in this respect is that this alleged statement and the alleged acquiescence therein by appellant amounted to an agreement by which appellant waived its banker's lien on the drafts. As to these statements and

the extent thereof, the evidence is in conflict. In further support of his contention that appellant was without right to make such application of the proceeds of said drafts, appellee relied upon telegrams (R. 209, 210) exchanged between the parties to this action at the time of the appointment of appellee as receiver of Richfield Oil Company and upon conduct of appellant occurring after the appointment of appellee as receiver, from all of which appellee contends that appellant waived its banker's lien and right of setoff. Said telegrams and said conduct of appellant will be discussed and described in detail in the argument hereinafter set forth.

Besides the proceeds of the two 180 day sight drafts drawn on Birla Bros., hereinbefore mentioned, the proceeds of two other drafts form part of the subject matter of this litigation. One of these is a third draft drawn on Birla Bros. at 180 days sight in the sum of $23,607.50. This draft was deposited with appellant for collection on January 8, 1931. The other draft, the proceeds of which are involved herein, was drawn on one, Ricardo Velazquez, in the sum of $1,219.00. This draft was deposited with appellant on December 27, 1930. Appellee bases his conclusion that these drafts were not deposited under and subject to the terms of the acceptance agreement upon the ground that they were deposited at a time subsequent to the issuance of the last acceptance (but admittedly before payment of all acceptances), and therefore, according to appellee's contention, they had no place under the acceptance agreement.

By way of recapitulation, the following schedule more clearly shows the drafts, the proceeds of which are the subject of this action:

Exhibit No.	Date Deposited	Draft No.	Customer	Amount	Time
	1930				
22	Oct. 8	103005	Birla Bros.	$63,950.00	180 days
23	Oct. 8	103006B	Birla Bros.	55,900.75	180 days
79	Dec. 27	123014	Ricardo Velazquez	1,219.00	60 days
	1931				
82	Jan. 8	13107	Birla Bros.	23,607.50	180 days

The numbers of the drafts designated were given to them by Richfield Oil Company. Appellant gave each draft its own number for the purpose of its records, but the Richfield number (appearing more frequently in the exhibits herein) will be applied to all drafts in this brief for the sake of convenience. The first two figures of the draft numbers refer to the month and the second two to the year in which the draft was drawn. The last two refer to the chronological number of the draft drawn in the particular month. (R. 290.) Thus, draft No. 123,014 was the fourteenth draft issued in the month of December, 1930.

Appellee's complaint seeks in addition to recover the sum of $469.06, representing part of the proceeds of draft No. 103,012 drawn on Bueno y Cia and deposited with appellant October 11, 1930. This draft was paid in installments, part of which were used to liquidate acceptances. The sum last mentioned represented the last installment which was received

in May, 1931. The trial Court found that this draft was deposited under and pursuant to the acceptance agreement, and therefore that it was properly applied toward the satisfaction of the indebtedness of Richfield Oil Company. (R. 188, 189, Finding XV; 195, 196, Conclusion VII.) This is conceded by appellee.

(For a complete schedule of all drafts deposited by Richfield with appellant, except the first four on Birla Bros., see page 293 of Record.)

(b) Issues.

At the trial of this action, appellant contended and here again contends that this case is not a difficult one; that the facts are neither complex nor for the most part disputed; that almost without exception appellant would have stipulated to the great mass of documentary evidence introduced by appellee. Appellant respectfully submits that the volume of testimony and the number of exhibits should not cloud the issues, which, in the opinion of appellant at least, may be simply stated and upon the facts and the law definitely determined. There cannot possibly be other issues than these:

(1) Were the drafts, the proceeds of which are the subject of this litigation, deposited under the acceptance agreement (R. 252, 253, 254, 255, 256, 257) and therefore subject to the provisions hereinbefore quoted therefrom? If they were, the second question is no longer in issue. If the Court decides that they were not delivered under and pursuant to the acceptance agreement, then

(2) Were they ever deposited under such an agreement as amounted to a waiver of appellant's banker's lien or right of setoff?

(3) Did appellant, subsequent to the appointment of the receiver, waive its contractual right or right to a banker's lien or setoff with respect to the proceeds of said drafts in such manner as legally to preclude it by estoppel or otherwise from relying thereon in this litigation?

(c) Statement of Appellant's Position.

Although appellant refused to advance to Richfield by means of acceptances or otherwise a sum in excess of the amount of certain sight or short term drafts, appellant's contention is that all drafts were nevertheless deposited as security for the acceptances issued and to be issued, and consequently were deposited under and pursuant to the acceptance agreements. These agreements constituted a contract between Richfield Oil Company and appellant, under the express terms of which appellant was entitled to hold all drafts, and the proceeds thereof, deposited under the acceptance agreements, as security, not alone for the acceptances issued thereunder, but likewise for "any other liabilities from us (Richfield) to you (appellant) whether then existing or thereafter contracted." No agreement to keep the transaction separate or apart, even if, as claimed by appellee, such an agreement amounts to a waiver of banker's lien, could vary by parol the quoted language of this written contract.

If, in spite of the overwhelming evidence of conversations, acts and records of both Richfield Oil Company and appellant in support of the contention that the drafts in dispute were deposited under the acceptance agreement, it should be determined that they were not so deposited, then admittedly they were at least deposited for collection, giving appellant the right to exercise its banker's lien and right of setoff against them and the proceeds thereof. There was no agreement to waive this lien or right of setoff even though it be determined that Mr. Hall unqualifiedly informed the officers of appellant that all of these transactions were to be kept "separate and apart". Such an agreement, as will subsequently be established, did not bring about a waiver of appellant's banker's lien or right of setoff.

It is the contention of appellee that subsequent to his appointment as receiver of Richfield Oil Company, a telegram (R. 209) which was sent by appellant to him in response to a telegram (R. 210) sent by him to appellant, plus the conduct of appellant subsequent to this exchange of communications, effected a waiver of appellant's lien. The reasoning by which appellee reaches this conclusion will be discussed later. In this connection appellant urges that:

(a) Appellant was not required to protect its rights by any reservation of its lien on the drafts in question in its said telegram of January 16, 1931;

(b) The language of the telegram with respect to the reservation actually made by appel-

lant, should be construed in a normal and ordinary manner to give to it the interpretation obviously intended;

(c) There was not in this exchange of telegrams or otherwise, any waiver or agreement to waive amounting to a contract nor was there any consideration for such alleged waiver;

(d) Appellee as receiver is not entitled herein to assert the rights of the other bank creditors of Richfield based upon an estoppel against appellant.

It is to all of the foregoing contentions that appellant will direct its consideration of the evidence and presentation of authorities.

II.

SPECIFICATION OF ERRORS.

The errors assigned by appellant are in substance as follows:

I.

The trial Court erred in granting a decree ordering payment to appellee by appellant of the sum of $163,305.85 for the reason that it appears from the record in this case that appellant is entitled to retain said sum and that appellee is not entitled to the same or any part thereof. (R. 476, 477. Assignment of Error I.)

II.

The trial Court erred in holding and deciding that the drafts, the proceeds of which are the subject of

this action, were not deposited under and pursuant to the acceptance agreements hereinbefore mentioned; that the banker's acceptances drawn by Richfield Oil Company of California upon appellant were secured only by foreign drafts of an aggregate amount slightly in excess of the amount of acceptances so issued, and only by drafts having a maturity shorter than the maturity of said acceptances, the proceeds of which could be and actually were received by appellant in San Francisco at least one day before the maturity date of the acceptances secured thereby; that appellant had no right to apply the proceeds of said drafts to the payment of the past due indebtedness of Richfield Oil Company of California to appellant in the sum of $625,000.00 and interest; that the acceptance agreement of October 4, 1930, as supplemented by the acceptance agreement of November 28, 1930, did not constitute the sole agreement entered into between Richfield and appellant respecting the deposit and collection of foreign drafts; and that there was an oral agreement entered into between appellant and Richfield Oil Company that said drafts were deposited with appellant for collection only and not as security for the acceptances drawn by Richfield Oil Company upon defendant. (R. 477, 478. Assignment of Error II.)

III.

The trial Court erred in finding that in the month of August, 1930, or at any time an oral agreement was entered into by and between said Richfield Oil Company and appellant; that the transactions respecting the deposit and collection of said drafts

should be separate and apart from all other financial transactions of said Richfield Oil Company with appellant. (R. 479. Assignment of Error III.)

IV.

The trial Court erred in holding that such an agreement, if any there was, constituted a waiver by appellant of its right to a banker's lien on said drafts and the proceeds thereof, and a waiver of its right to offset said proceeds against the past due indebtedness of said Richfield Oil Company of California to appellant in the sum of $625,000.00 and interest. (R. 479, Assignment of Error IV.)

V.

The trial Court erred in deciding that the said drafts or any thereof or the proceeds thereof were not deposited in the ordinary course of business, and said Court further erred in holding and deciding that said drafts or any thereof or the proceeds thereof were deposited with appellant under a special agreement or for any special purpose or constituted a specific deposit or trust. (R. 479, 480. Assignment of Error V.)

VI.

The trial Court erred in holding and deciding that either prior to or subsequent to the appointment of appellee as receiver of said Richfield Oil Company of California, appellant by acts, conduct, writing or statements or by agreement with appellee or with the other bank creditors of said Richfield Oil Company, waived its banker's lien on the proceeds of said drafts

or its right to apply said proceeds to the payment of said past due indebtedness of the Richfield Oil Company of California to appellant. (R. 480, 481. Assignment of Error VI.)

VII.

Said Court erred in holding and deciding that appellant had no right to a banker's lien on said drafts and the proceeds thereof as provided in Section 3054 of the Civil Code of the State of California, and no right to apply said proceeds to the payment of said past due indebtedness of said Richfield Oil Company to appellant. (R. 481. Assignment of Error VII.)

VIII.

Said Court erred in admitting in evidence:

(a) Testimony adduced in behalf of appellee by the witnesses William C. McDuffie and Edward Nolan as to a meeting held on or about January 15, 1931, between appellee and representatives of the bank creditors of said Richfield Oil Company of California, with the exception of appellant, and all conversations and statements made at said meeting, the substance of which was an agreement that all cash balances of Richfield previously appropriated by said banks should be restored to the receiver of Richfield, and that in all cases where cash balances in said banks still stood to the credit of Richfield, said banks would refrain from appropriating the same to the satisfaction of their claims against the company. Said testimony was incompetent, irrele-

vant and immaterial, hearsay, and not binding on appellant, and its introduction was an effort on the part of appellee to assert an estoppel against appellant in favor of persons not parties to this action, to-wit, the other bank creditors of Richfield.

(b) Letters and telegrams introduced by appellee marked Plaintiff's Exhibits 4 to 11 inclusive, as set forth in the Narrative Statement of Evidence for use in the appeal of this cause, being communications from various bank creditors of said Richfield Oil Company of California to appellee relating to the restoration of such balances, said documents being incompetent, irrelevant and immaterial, hearsay, and not binding on appellant, and their introduction being an effort on the part of appellee to assert an estoppel against appellant in favor of persons not parties to this action, to-wit, the other bank creditors of said Richfield Oil Company of California.

(c) Testimony adduced in behalf of appellee purporting to establish an oral agreement between appellant and said Richfield Oil Company of California to the effect that all transactions concerning the deposit and collection of foreign drafts should be kept separate and apart from all other financial transactions between Richfield and appellant, the purpose of said testimony being to vary the terms of said written acceptance agreement providing that all the collateral deposited as security thereunder should likewise

stand as security for all other obligations of said Richfield Oil Company of California to appellant, said testimony being for that reason not properly admissible.

(R. 481, 482, 483. Assignment of Error VIII.)

III.

ALL THE DRAFTS IN LITIGATION WERE DEPOSITED BY RICHFIELD WITH APPELLANT UNDER AND SUBJECT TO THE ACCEPTANCE AGREEMENTS, PURSUANT TO THE TERMS OF WHICH APPELLANT HELD THE DRAFTS AS SECURITY FOR THE GENERAL INDEBTEDNESS OF RICHFIELD TO IT.

The question presented by this phase of the case can be answered only from necessary and proper inferences to be drawn from the facts and circumstances, for the record is barren of any express agreement between Richfield Oil Company and appellant stating whether the drafts in question were or were not to be placed under acceptance agreements.

The lower Court held in its Finding No. XVII (R. 189, 190) that the drafts which form the subject of this litigation were not deposited under the acceptance agreement as security for acceptances. Appellant has specified this as error (R. 477, 478, Assignment No. I), relying, not upon any particular conflict in the facts, for little, if any such conflict on material points appears in the evidence, but on the impropriety of the conclusion which the trial Court reached from these facts. This appeal being in equity, the trial Court's findings are not binding on this Court

and, because the finding is a mere conclusion from the facts, it has herein even less weight than usual.

(a) History of the Inception of the Transactions.

On or about the 22d day of August, 1930, Robert L. Hall, the Manager of the Foreign Department of Richfield Oil Company of California, visited San Francisco (R. 340) for the purpose of opening negotiations for the transfer of Richfield's foreign draft collection business to appellant. On this occasion, a series of conferences took place between Mr. Hall, William G. Gilstrap, Assistant Manager of appellant's Foreign Department, Frederick J. Hellman, Vice President of appellant in charge of the Foreign Department, and Mr. F. L. Lipman, President of the bank. A reference to the testimony of each of these persons concerning this visit (R. 340, 341, 342, 343, 344, 369, 370, 436, 437, 438, 439, 448, 449) shows that negotiations on this occasion were merely preliminary in character. The relative merits of the banker's acceptance method of handling collections as compared with the discount method were discussed. Mr. Hall spoke in a general way of the foreign customers of Richfield, including Birla Bros. Ltd. At a short meeting with Mr. Lipman (R. 448, 449, 436, 437, 438, 439) at which Mr. Hellman was present, Mr. Hall was informed by Mr. Lipman that appellant would be willing to extend to Richfield Oil Company a line of credit based upon foreign drafts in addition to the loan accommodations which appellant already had given Richfield. The amount of this line of credit, as Mr. Lipman informed Mr. Hall, was to be fixed

at a figure between $150,000.00 and $250,000.00. (R. 449.) After the conference with Mr. Lipman, Mr. Hellman informed Mr. Hall that the amount of the credit which appellant would extend to Richfield in this manner would be the sum of $150,000.00. (R. 439.)

Since Hall was not authorized to bind Richfield Oil Company in financial transactions (R. 358), he found it necessary to return to Los Angeles in order to bring the matter to the attention of the officials of Richfield.

Prior to October 1, 1930, Hall telephoned to Gilstrap informing him that Richfield had decided to avail itself of the acceptance credit. At that time he asked Gilstrap to send to him the necessary forms for execution. (R. 370.)

On the morning of October 6, 1930, Mr. Hall, accompanied this time by Homer Pope, who was then a clerk in Richfield's Foreign Department, returned to San Francisco. (R. 251, 371.) Hall and Pope brought with them the acceptance agreement to which reference has previously been made (R. 251), duly executed under date of October 4, 1930, for and in behalf of Richfield Oil Company, by R. W. McKee, Vice President, and W. R. Hart, Treasurer. They also brought with them fourteen acceptances signed by Richfield Oil Company in the total amount of $150,000.00. These acceptances and the acceptance agreement were delivered to appellant through Gilstrap. (R. 346.)

Thereupon appellant accepted $115,000.00 worth of acceptances and sold them. The proceeds of these acceptances were received by Hall on the same day and were transmitted by him to Richfield in Los Angeles by means of telephoto.

(b) The Circumstances Surrounding the Inception of the Foreign Draft Collection Transactions of Richfield Oil Company of California With Appellant Prove That the Drafts Were Deposited Under and Subject to the Acceptance Agreements.

(1) There Was But One Agreement Entered Into Between Appellant and Richfield Oil Company.

From the history of the original negotiations between Richfield and appellant, as hereinbefore set forth, it is obvious that the execution and delivery of the acceptance agreement was the vital factor around which everything else which followed was bound. Since the parties had agreed upon the acceptance credit method, the execution and delivery of this acceptance agreement was the condition precedent to the commencement of business.

There is nothing in the entire record of this case, apart from mere opinions of appellee's own witnesses, which could possibly be considered as evidence of an agreement, independent of the acceptance agreement itself, by the terms of which certain drafts were to be deposited under the acceptance agreement and certain drafts were not.

The significant thing is that as a result of the preliminary negotiations in August, *the parties decided to do business on an acceptance credit basis and on an acceptance credit basis only.* To vitalize this deci-

sion, Richfield executed and delivered the acceptance agreement. Thereafter, *in pursuance of the decision to do business in this manner,* Richfield commenced the deposit of the foreign drafts for collection.

Mr. Pope in response to questions propounded by counsel for appellee endeavored to testify that the 180 day drafts were deposited solely for collection and not as security for acceptances. This was a mere conclusion of the witness. Not alone is this denied repeatedly in the testimony of Messrs. Gilstrap, Leuenberger and Hellman, but Mr. Hall, himself (and it must be remembered that Mr. Hall was present throughout the sole conference which Mr. Pope attended), testified on direct examination, flatly contradicting Pope, as follows:

> "I don't think there was anything said by Mr. Gilstrap or by myself and Mr. Pope during that conversation as to how the 180 day paper would be handled."
>
> (R. 346.)

Subsequently, in response to the repeated questioning of counsel for appellee with respect to the depositing of the 180 day drafts for collection, he further testified:

> "To the best of my knowledge, the only remark that was made as to what would be done with the 180 day drafts was that Mr. Gilstrap said when I turned over the entire papers that he would send them all together to the correspondent in Calcutta. I don't remember anything having been said in the prior conversations occurring between myself and Mr. Gilstrap respecting the collection of the 180 day drafts."
>
> (R. 348.)

It is apparent that Mr. Pope's memory, in this respect at least, is faulty.

The foregoing undisputed (except for Pope's contradicted testimony) facts compel the conclusion that all drafts were deposited as a result of and in pursuance of the decision to do business on an acceptance credit basis; although subsequently the amount of the acceptances actually issued was far less than the total face amount of the drafts deposited, nevertheless, all drafts were deposited as security for the acceptances and as integral parts of a preconceived plan, the substance of which is found in the terms of the acceptance agreement.

(2) The Officers of Appellant Informed Mr. Hall That Advances Would be Made Against All of the Foreign Drafts Deposited by Richfield Oil Company of California.

The fundamental reason underlying appellee's contention and the Finding of the lower Court that the first two 180 day Birla drafts were not deposited as security for banker's acceptances, and consequently not deposited under the acceptance agreement, is found in the statements by Gilstrap to Hall that appellant would advance only the approximate amount of the two sight drafts under acceptances with maturities of 90 days from date, and that only drafts with maturities of less than 90 days would be considered as bases for acceptances. (R. 346, 262, 263.) As to the third Birla draft, No. 13,107, deposited on or about January 8, 1931, and the draft on Ricardo Velazquez, No. 123,014, deposited on the 27th day of December, 1930, appellee claims that since no accep-

tances were issued after November 28, 1930, these drafts could not have been deposited as security for acceptances. This overlooks the fact that there were at these times unmatured and unpaid acceptances still outstanding.

It is the contention of appellant that every draft deposited with it during the period commencing with October 8, 1930, and ending on January 15, 1931, was deposited as security for acceptances and consequently under the acceptance agreement.

That this was the understanding of the officers of appellant and that this understanding was communicated to Hall at the inception of these transactions, is conclusively shown by the testimony of both Mr. Lipman and Mr. Hellman, corroborated by Mr. Hall. Mr. Lipman testified as follows:

> "I received a visit from a representative of the Foreign Department of the Richfield Oil Company in the month of August, 1930. This representative, Mr. Hall, stated that there had been some prior discussion as to this line of business, and I think I said something to the effect that if these drafts were good security, that is, if they were drawn on people we had confidence in, *we could regard those as collateral for an acceptance credit.* This representative assured me that the drafts were quite all right."
>
> (R. 448, 449.)

In this connection Mr. Hellman testified as follows:

> "To the best of my recollection I told Mr. Hall that I thought that we, meaning the Wells Fargo Bank, would be willing to go into such a trans-

action *advancing them on their collections,* and that I could see nothing that would stop us from doing it, but as long as they had other lines in the bank I would rather consult with Mr. Lipman first."

(R. 436.)

Mr. Hall's testimony in this regard is as follows:

"Mr. Lipman told me that he had heard good reports from his Foreign Department in regard to collections of the Foreign Department of Richfield. Mr. Lipman stated that he had accommodated Richfield to a large extent and also had accommodated Mr. Talbot, and he would give a further line of credit *based* on foreign drafts in the amount of $150,000.00 or thereabouts and see how it would work out."

(R. 343.)

"I don't think Mr. Lipman stated that he would advance $150,000.00 or $200,000.00 upon the security of our foreign collections—I think he used the word 'drafts'. To the best of my recollection Mr. Lipman's statement was that *he would advance upon the security of our foreign drafts $150,000.00 to $200,000.00.*"

(R. 358.)

In all of this testimony of witnesses on both sides *a line of credit based on foreign drafts* was referred to.

This testimony leaves no room for doubt that from the outset the officers of appellant did not intend to make any distinction between drafts that were to be deposited with them, except to limit the *amount*

of advances to the extent of drafts maturing in 90 days or less, but did intend that all drafts should be security for acceptances. Since this intention was definitely communicated to Hall, who acted for Richfield in the entire transaction, Richfield and appellee stand bound by it.

On the same day that these statements were made, Hellman decided, after the conference with Mr. Lipman, that the extent of the credit which would be granted against the foreign drafts would be $150,000.00, and he so informed Hall. (R. 439.) From his long experience with Richfield's Foreign Department, which he organized and built up, Hall must have known then that the amount of foreign drafts which Richfield would have outstanding at any one time would soon far exceed the sum of $150,000.00, the limit of the credit. He must have known then that the next shipment to Birla Bros. would in all probability far exceed the sum of $150,000.00, and in fact it did. Therefore, he knew or should have known, in the light of the statements made to him by Hellman and Lipman, as hereinbefore set forth, that there would be deposited a great many drafts which would not be used in *measuring* the amount of advances under the acceptances, but which appellant would nevertheless consider as security for acceptances.

It is submitted that the fact that some of the foreign drafts were not used as a basis for measuring the advances which were made to Richfield Oil Company is not a sound reason for the conclusion that

these drafts were not deposited as *security* for the acceptances. The most usual practice followed by lenders in taking security for their loans requires the value of such security to exceed greatly the amount of the loan. A simple analogy may here be cited as illustrating what the transaction between appellant and Richfield really was:

A man goes to his banker with $10,000.00 in Liberty Bonds and $10,000.00 face value of unmarketable securities, and asks the banker: "How much will you lend me *against* these securities?" The banker says: "We will not take into consideration your unmarketable securities, but will lend you to the extent of your Liberty Bonds, viz., $10,000.00." All the securities are deposited. There is no doubt that the loan is against all of the securities, but only in an amount based on the Liberty Bonds. All are security,—even the unmarketable bonds having no value. If we transpose Liberty Bonds into sight or short term or other satisfactory drafts, and transpose the unmarketable securities into 180 day or other unsatisfactory drafts, we have the case at bar.

Appellee answered this analogy in the lower Court with the argument that if the hypothetical borrower had gone to his banker with $10,000.00 in Liberty Bonds and $10,000.00 face amount of unmarketable securities (for instance, notes receivable) and asked the banker: "How much will you lend me against these securities?" and the banker had said: "We are willing to lend you $10,000.00 upon your Liberty Bonds, but will lend you nothing upon your notes

receivable, although we will be glad to take them for collection, charging you the usual commission for making the collection," no Court would listen to any claim on the part of the banker that the loan was secured by the notes receivable as well as the Liberty Bonds. This answer is simple of disposition. It is not sustained by the evidence and is contrary to common experience. Even if the Liberty Bonds were sufficient in and of themselves to support a loan of $10,000.00, what banker would refuse the added margin of safety from further security, regardless of its value? It is but natural to accept all the security that may be forthcoming. For the same reason, all the probabilities, in addition to the evidence, point to the conclusion that appellant did the same thing with respect to the deposit of foreign drafts by Richfield.

(3) The Testimony of Appellee's Own Witnesses Substantiates Appellant's Position.

The testimony of Mr. Pope is convincing that he misunderstood the nature of the transaction into which Richfield was entering for his conclusion that the 180 day paper was not to be deposited as security for acceptances is not supported by his premise. Thus, Mr. Pope testified:

> "The question came up as to whether we might base acceptances on both sets of drafts. He told us he would be glad to consider the sight draft but because of the length of time and because of the credit standing, he would not consider the 180 day drafts on Birla Bros. We argued with him that we had never had any trouble with

> Birla Bros. and that they had always been very prompt pay, and we urged him to let us use the 180 day drafts *as a basis for bank acceptances,* but he refused."
>
> (R. 262.)
>
> "I believe that Mr. Gilstrap and Mr. Leuenberger said: 'we cannot use as a *basis* for the amount of your acceptances the 180 day paper on Birla Bros.' They did not tell me as I remember it that they waived the *security* of that paper because I do not believe that came into the discussion."
>
> (R. 319.)

All of this testimony supports the soundness of appellant's position. For, by the use of the word "basis," appellee's witness has demonstrated that the 180 day drafts simply were not to be considered in measuring the amount of the advance which would be made to Richfield by means of acceptances. This, however, by no means contradicts appellant's contention that the acceptances were issued *against* the 180 day paper, as well as the sight paper, and that all were security for the acceptance.

Counsel for appellee, at the trial, attempted to answer this point with the argument that in most of the cases where Pope testified in this manner, he did so in response to a question in which the word "basis" was used. Although the record on this appeal does not, of course, show the questions which were put to the witness, the truth is that the witness first testified in this manner voluntarily in response to

questions put to him by his own counsel, in which this word was not used.

Counsel further argue that the meaning of this word when used by the witness necessarily must depend upon the meaning intended to be given to it by the person testifying; and that in order to ascertain such meaning, reference should be had to all of the witness's testimony upon the subject matter in connection with which the word "basis" was used. Counsel overlook, however, that the witness was testifying as to *what was said* at the time of the conference. He was not then drawing a conclusion. On the other hand, his ultimate conclusion that the 180 day drafts were not security for acceptances, deduced from what was said as to using the 180 day drafts as a *basis* for acceptances, is unwarranted, and in any event, is immaterial; the use of the word "basis" cannot be explained away in the manner counsel have attempted.

Counsel further rely upon the following testimony of Pope as showing what meaning he intended to convey by the use of the word "basis":

> "He told us that it would be necessary to put up a sufficient amount of drafts in money to cover the bank acceptances. It would only be necessary to have enough from the proceeds of the drafts to cover the bank acceptances to be paid."
>
> (R. 263.)
>
> "To the best of my knowledge there was also an agreement that the 180 day drafts would be accepted for collection only and not be used as a

basis for the issuance of acceptances. The Richfield Oil Company was only required to deposit sufficient drafts, the net proceeds of which would satisfy the amount of the bank acceptances."
(R. 314.)

This testimony, however, is consistent with the claim of appellant that these drafts were all deposited as security for acceptances even though only the approximate amount of the sight drafts was advanced. Simply because the minimum requirement may have been that Richfield deposit short term drafts in an amount at least equal to the amount advanced by appellant, it does not follow that appellant was precluded from the acceptance of drafts, as security, in a much greater amount than that of the banker's acceptances issued.

(4) Appellee's Case Is Largely Based on the Misconception of the Witness Pope.

Appellee's contention that the drafts, the proceeds of which are the subject of this litigation, were not deposited under the acceptance agreement, rests upon an imaginary distinction between drafts supposedly deposited solely for collection, and those supposedly specifically designated as security for acceptance. The fact that the evidence does not support any agreement other than the acceptance agreement regarding the deposit of drafts for collection has hereinbefore been discussed.

Granting that appellee is in good faith in the contention that certain drafts were under the agreement

and others not, it occurs to appellant that the error in appellee's belief arose through Mr. Pope's misunderstanding of a new and to him strange transaction. He testified in substance that Mr. Gilstrap told him that the proceeds of the draft which were under the acceptances must be in San Francisco before the maturity date of the acceptances issued on the drafts. (R. 261.) The Court's finding to this effect (Finding No. XVII, R. 189, 190), has been specified as error. (Assignment No. II, R. 477, 478.) Gilstrap testified that there was no such statement made to any representative of Richfield. (R. 373.) Gilstrap stated, however, and appellant believes this to be the source of Pope's error (R. 373), that the acceptance agreement required that Richfield pay the *acceptances* at the office of appellant at least one day before the maturity of the *acceptances*. The provisions of the acceptance agreement in this respect are as follows:

> "In consideration of your acceptance of the said draft or drafts the undersigned, jointly and severally, agree to pay you at the time of the acceptance a commission of —— per cent, and further agree to pay you the amount of the said draft or drafts at your office one day before maturity."
>
> (R. 253.)

The use of the word "drafts" in the agreement may be confusing. The explanation is that an acceptance is a draft prior to its acceptance by the bank and the agreement, in referring to the "drafts" to be issued on the security thereunder, described Richfield's acceptances. This cannot be controverted.

In answer to this contention, appellee at the trial argued that there is evidence in this case that appellant would not have issued acceptances on the unsecured signature of Richfield Oil Company, since at that time Richfield was already indebted to appellant to a large extent on a loan which was then unsecured. Therefore, it was argued, appellant was looking solely to the proceeds of the drafts for its payment and must necessarily have required that such proceeds be on hand at least one day prior to the maturity date of the acceptances. This, however, overlooks the fact that even though the proceeds of the drafts should not be received in advance of the maturity date of the acceptances, and even though Richfield Oil Company should fail to pay the amount of the acceptances one day in advance of the maturity date thereof, appellant still would have the security of the drafts and proceeds thereof. Furthermore, the mere fact that the drafts, by their terms, provided for payment prior to the maturity of the acceptances was no guaranty that they would be paid then; the probability of payment on short term drafts is no greater than on long term drafts. Thus appellant looked to Richfield Oil Company as maker of the acceptances, taking, however, the security of drafts which would mature either before or after the maturity date of the acceptances.

(5) The Controlling Effect of the Letter Marked Defendant's Exhibit "A".

The most helpful declaration of either Richfield or the bank as to what drafts secured the acceptances

is embodied in that letter (Defendant's Exhibit "A") to which reference has hereinbefore been made, written by Richfield Oil Company to appellant, and delivered, together with the drafts and letters of transmittal, by Hall to Gilstrap on the morning of October 8, 1930. This letter reads as follows:

"E. Leuenberger, Assistant Vice President,
Wells Fargo Bank & Union Trust Company,
Montgomery & Market Streets,
San Francisco, California.
Dear Sir:

We are sending by Mr. Hall, documents covering a shipment of Birla Brothers, Ltd., Calcutta, India.

Will you please release against this shipment $115,000 worth of acceptances made payable at ~~120~~ days sight.

90 R. L. H.

Very truly yours,
G. P. Lyons,
Comptroller."

(R. 316.)

At the trial of this action, counsel for appellee introduced a great number of exhibits consisting of almost every letter and document in any remote way concerning the transactions here in question which came into existence between October 8, 1930, and May 8, 1931. Yet, in all the careful and detailed marshalling of evidence so undertaken by counsel for appellee, there was no attempt to examine at the trial any of appellee's witnesses, Hall, Pope or McDuffie, or to cross-examine Gilstrap, Hellman or Leuenberger, or any other witnesses of appellant, with

respect to this particular letter. Of all of the letters which passed between appellant and Richfield Oil Company during this period of time, counsel for appellee scrupulously failed to introduce this one in evidence. In a case as well and as thoroughly presented as was appellee's, the answer is obvious; appellee's neglect of the document was not an error or oversight of diligent and able counsel, but an endeavor to forget, if possible, a vital weakness in the entire chain of argument. Mr. Pope testified on cross examination in explaining the reference in Exhibit "A" to the release of acceptances for $115,000.00 *against* the Birla Bros. *shipment* that "the documents covering a shipment to Birla Brothers" referred to the same documents described in the two letters of transmittal deposited with appellant on the same date. (R. 317.) The first of these letters (R. 266, 267) (marked Plaintiff's Exhibit 22 at the trial) stated in part as follows:

> "We are enclosing the following enumerated documents covering shipment going forward to Calcutta, India, per the M/S 'Silver Hazel'.
>
> Our draft #103004 amounting to $63,950, drawn at sight on Birla Brothers, Ltd.
>
> Our draft #103005 amounting to $63,950, drawn at 180 days sight on Birla Brothers, Ltd."

The other of these letters of transmittal (R. 268, 269) (marked Plaintiff's Exhibit 23 at the trial) contained the following list of enclosures:

> "Our draft #103006-A amounting to $55,900.76 drawn at sight on Birla Brothers, Ltd. at Calcutta.

> Our draft #103006-B amounting to $55,900.75 drawn at 180 days sight D/A on Birla Brothers, Ltd. at Calcutta."

In each case the "Shipment to Birla Brothers" was represented by one sight and one 180 day draft in equal amounts. Draft No. 103005 for $63,950.00, and draft No. 103006-B for $55,900.75, referred to in these two letters of transmittal, are the same two 180 day drafts in the total face amount of $119,850.76, whose proceeds constitute such a considerable part of the Judgment recovered by appellee in the trial Court.

Notwithstanding the conclusion of the witness Pope that the 180 day drafts were not to be security for acceptances, and that the first $115,000.00 worth of acceptances were issued only against the two sight drafts on Birla Bros., and notwithstanding the argument of counsel for appellee at the trial that only the sight drafts were taken as security for the acceptances, the record is clear and uncontradicted that Richfield Oil Company through Mr. Lyons, its Comptroller, to whom Hall had explained the transaction (R. 362), wrote this letter.

It confirms in a simple and decisive fashion that Richfield Oil Company completely understood that appellant was advancing funds *against all of the drafts* (i. e., against the shipment) which Richfield Oil Company at that time was depositing, including the 180 day drafts on Birla Bros.; that although the amount of the advances was much less than the amount of the drafts deposited, all of the drafts were to be held as security for the acceptances; and

that Richfield understood that when Mr. Lipman and Mr. Hellman told Mr. Hall that appellant would grant a line of credit against foreign drafts of Richfield, there was no distinction made to the effect that some drafts were to be security for the acceptances and others were not. Appellant submits that this letter, so scrupulously avoided by counsel for appellee at the trial, is an admission of Richfield Oil Company completely destructive of appellee's claim that the drafts in litigation were not deposited under and subject to the acceptance agreement.

Forced to avoid, if possible, the damaging effect of this letter, counsel for appellee argued that since Richfield was in financial stress, Lyons, the writer of the letter, was interested in obtaining the first $115,000.00 as quickly as possible, and that the letter was written by him with this object alone in view. It was further urged that since the details of the transaction had previously been agreed upon, the letter did not undertake to restate them or to modify the agreement. Counsel likewise contended that the letter was of the character which any one under like circumstances would have written, the writer never imagining that it would subsequently be characterized as illustrative of the agreement existing between the parties; it was also argued that Lyons, at the time of writing the letter, was ignorant of the transactions between the parties because all negotiations were conducted by Hall and Pope. The last contention is definitely refuted by the facts. It is undisputed that Hall, who supposedly knew all about that transaction, personally delivered the letter to Gilstrap, and that

in his own handwriting he changed the statement in the letter as to the maturity dates of the acceptances therein requested to be issued. His testimony is as follows:

> "I brought the letter, Defendant's Exhibit 'A'. The change in the maturity date of acceptances from 120 days to 90 days on this letter is in my handwriting."
>
> (R. 362.)

Hall, therefore, knew the contents of the letter, yet with the one exception just noted, he did not attempt to change it. The inference is compelling that the letter did not conflict with his understanding of the transaction.

Against the plain language of this letter, the other explanations of counsel likewise fail. The letter is clearly illustrative of the agreement between the parties. That Lyons ever at any time thought the agreement to be otherwise than that which appellant contends to be the case, or that he never imagined the letter would be used as illustrative of this contention, are mere assumptions unsupported by direct or inferential evidence, for Lyons was not called as a witness.

It is admitted that prior to the writing of this letter and the delivery thereof to the bank, the acceptance agreement had been presented to the bank, duly executed, and was in full force and effect. The first items transmitted subsequent to the execution of the agreement are the four Birla Bros. drafts, and the Richfield Oil Company has on its own stationery, by

its own officer and in its own language, requested appellant to "please release *against* this shipment $115,000 worth of acceptances." As the shipment was represented by the sight *and* 180 day drafts, the release of acceptances was *against them*. There can, therefore, we submit, be no dispute upon the fact, taken from the mouths of appellee's witnesses and from the language of Richfield Oil Company's letter, that both the sight drafts and the 180 day Birla Bros. drafts were security under the acceptance agreement.

It should be noted in passing that Mr. Lyons was the Comptroller or financial officer of Richfield Oil Company, one of those to whom Mr. Hall had to refer in making financial arrangements, and furthermore, that Mr. Hall testified as having reported to him the result of the San Francisco conference on his return to Los Angeles on the morning of October 7, 1930. (R. 362.)

(c) The Execution of the Acceptance Agreement Created a Revolving Credit.

The chief fallacy in the position taken by appellee and in the reasoning in the opinion of the lower Court and as a result of which the conclusion was reached that the first two 180 day drafts on Birla Bros. were not deposited under the acceptance agreements, is found in the narrow view taken by both the Court and appellee, that if these drafts secured any acceptances at all, such acceptances could only have been the first $115,000.00 worth issued by appellant at the time of the deposit of said drafts on October 8, 1930. Appellee then points out that since

it was necessary that Birla Bros. pay the sight drafts before they would be entitled to possession of the shipments, and since the proceeds of the sight drafts would be received in San Francisco many months before the maturity of the 180 day drafts with a resultant satisfaction of the $115,000.00 worth of acceptances, the 180 day drafts could by no possibility be security for said acceptances. Consequently it was argued that the deposit of the 180 day drafts as security for the acceptances mentioned could not have been within the contemplation of the parties. We were further cited in the trial Court to the fact that the last of the acceptances matured on February 26, 1931, while the proceeds of the 180 day Birla time drafts by their said terms, could not be realized upon until May, 1931. It is contended by appellee that the 180 day drafts could not therefore have been deposited as security for any of the acceptances because of their maturity at a time, as appellee contends, when the acceptance agreement was no longer in force. This narrow view is strongly illustrative of the manner in which appellee has built up his case from a retrospective standpoint rather than from a prospective view of the transaction as of the time when the negotiations for and the execution and delivery of the acceptance agreement took place.

On the other hand appellant's contention is that the acceptance agreement was intended as a continuing one until either party called a halt; that Richfield and the bank both understood that said agreement created a revolving or "line" of credit to the extent of $155,000.00; that Richfield's loan limit on accep-

tances was $155,000.00 outstanding at any one time; and that when the limit was reached no more acceptances would be issued until payment of any of the outstanding acceptances made part of the credit again available.

At the time of the delivery of the first acceptance agreement on October 6, 1930, Richfield Oil Company and appellant contemplated, not one transaction, but a continuous deposit of drafts and issuance of acceptances during an indefinite period of time, the limits of which were then unknown but, as far as could then be ascertained, might well be for one, two or several years. Thus a credit, or "line of credit" was established and the acceptance agreement executed containing the limitation in the amount of the credit agreed upon but no time limit within which the transactions were to be carried on.

With a continuous series of deposits of drafts and issuances of acceptances under one agreement contemplated by the parties to extend over a period of time, probably far beyond the date of the maturity of the 180 day drafts, the supposed impossibility of using these drafts as security for acceptances becomes non-existent. On the contrary, the 180 day drafts on Birla Bros. stood as effective and useful security for any acceptances or other obligations permitted or provided for by the acceptance agreement.

This same argument holds for the drafts deposited after November 28, 1930, the date when the last acceptance was issued, including the third draft on Birla Bros. in the sum of $23,532.08, and that on Ricardo

Velazquez in the sum of $1,245.11; they likewise were deposited under and subject to the acceptance agreement and were security for existing or future obligations provided for therein.

Each of the acceptance agreements is blank as to the drafts and securities which were to be deposited thereunder. Parol evidence was therefore admissible to prove what drafts were so deposited. There is no dispute with regard to this. The very existence of these blanks, however, is mute evidence of the soundness of appellant's contention that a revolving credit was intended, for such an arrangement caused it to be impracticable and impossible to list the drafts deposited or to be deposited under the acceptance agreement. The testimony of Gilstrap, corroborated by that of Pope, explains this and leaves no room for doubt that a definite purpose lay behind the failure of the parties to fill in the blanks in this agreement. At the time of the delivery of the agreement the blanks were considered. Mr. Gilstrap's testimony in this connection and with respect to the existence of a revolving credit is as follows:

> "I told him that the acceptance credit which we had granted Richfield was a continuous one, that is, a revolving one, which might be availed of by them to an extent not exceeding $150,000 in acceptances outstanding at any one time; that the acceptance agreement which he had given us was intended to cover any acceptances which might later be executed by us, within a limit of $150,000 outstanding at any one time; that the acceptance agreement did not stipulate the exact amount of acceptances, that is the exact

amount for which each acceptance was drawn, because we did not know nor did they know nor did any one know in what amount the acceptances would be issued and when they would be issued. That would be dependent upon the collections which later would be forwarded to us. Likewise, no mention could be made, as I told Mr. Pope, of the collections which were the security for this particular credit, because for the same reason neither they nor we knew exactly what collections would later be sent us. Rather than have them have to execute a new acceptance agreement each time that a new acceptance was asked for or each time that they sent us a new collection, I explained to Mr. Pope that this one agreement was expected to be a blanket one."

(R. 371, 372.)

Mr. Pope's testimony in this respect is as follows:

"The first time I saw this acceptance agreement, Plaintiff's Exhibit 16, was a few days before we came up to San Francisco. I did not discuss its contents with any one. I did not make any inquiry as to why there were blanks in the agreement. I believe that subject came up during our conversation with Mr. Gilstrap. To the best of my memory I believe something of this nature was said by Mr. Gilstrap: 'As you will be depositing acceptances from time to time under this arrangement and drafts under this arrangement, all of which you cannot identify now, it is impossible to fill in those blanks at the present time'. We could not give by number and reference on October 6th or 7th drafts that we would deposit on October 10th or 12th. But none the less it

might be that drafts of October 10th or 12th were intended to apply under the agreement."

(R. 313.)

The weakness of Pope's conclusions regarding the non-existence of a revolving credit is apparent in the following excerpt from his testimony:

"It is my understanding that after we had issued the initial $150,000 of bank acceptances which we brought up it would be necessary to make out a new acceptance agreement. I cannot remember any one telling me that. I was not familiar with these transactions to any extent before I came to the bank in the early part of October and the whole thing was strange to me."

(R. 313.)

As has been pointed out previously in connection with the testimony of Hellman and Gilstrap relative to the inception of Richfield's loan on its foreign collections, the negotiations all concerned the establishment of a *line* of credit. Mr. Hellman, in testifying as to the conference between Mr. Lipman and Mr. Hall, said:

"Then the question came up of the amount of credit. I believe Mr. Lipman said to Mr. Hall, 'We will advance you $150,000, $200,000, $250,000, on your foreign collections'. He said to Mr. Hall that this credit was to remain in force until it was cancelled by either side; that we did not know whether it would work out or not; we did not know what kind of foreign collections they were handling, and if it did not work out we reserved the right to cancel the credit."

(R. 438.)

Mr. Hall himself corroborated this:

> "Mr. Lipman stated that he had accommodated Richfield to a large extent and also had accommodated Mr. Talbot, and he would give a further *line of credit based on foreign drafts in the amount of $150,000 or thereabouts and see how it would work out.*"
>
> (R. 343.)

The foregoing establishes the understanding on the part of all concerned that a credit to the extent of the amount specified was granted to run over a considerable period of time and that there was no necessity for executing a new acceptance agreement each time a fresh advance should be made over and above the original $150,000.00 as long as not more than that amount was outstanding under the agreement at any one time. The acceptance agreement itself is in its terms entirely consistent with and supports this understanding.

That appellant recognized that the acceptance agreement created a revolving credit is quite apparent from the ledger page which was produced by it at the trial at the instance and request of counsel for appellee and introduced in evidence by the latter as Plaintiff's Exhibit 122. (R. 394, 395, 396.) This record leaves no doubt as to the parties' understanding of the transaction; the figures thereon conclusively show that when an acceptance was paid and the credit under the acceptance agreement was received, the amount of the payment was entered on the ledger sheet as being thereupon again available to Richfield,

without the necessity of issuing a new acceptance agreement. The details with respect to this are well set forth on the exhibit itself and in Mr. Gilstrap's testimony. (R. 396, 397, 398.)

That Richfield understood that it was granted a revolving credit by appellant is illustrated in the testimony of Mr. Hall:

> "The only time that a continuous credit was mentioned was I believe by Mr. Gilstrap at first. He said that it could be handled on an acceptance or form a revolving or continuous credit."
>
> (R. 359.)

Counsel for appellee argued at the trial that since the existence of a revolving credit was not pleaded by appellant in its answer, it was not properly within the issues of the case. But appellant actually had no opportunity to raise the issue before the trial; appelland pleaded in its answer that there was only one agreement between the parties, to-wit, the acceptance agreement. (R. 105, 115.) This allegation is nowise inconsistent with the contention that a revolving credit was created, for it was the acceptance agreement itself which produced the revolving credit.

Appellee further argued that the failure of appellant to call to the attention of Richfield, after the payment of the Birla Bros. sight drafts on December 15, 1930, that it had the right to obtain additional moneys under the acceptance agreement, is indicative that no continuing credit existed. However, the acceptance being a ninety day obligation of both Richfield and the bank, until it was actually paid the obligation

thereon still existed, notwithstanding any anticipated payments prior to maturity. The earliest time when Richfield Oil Company had the right under the acceptance agreement to further credit was upon the actual payment of the acceptances for $115,000.00 on January 6, 1931. Appellee then contended that the fact that Richfield asked for no additional advances after the final satisfaction of the first $115,000.00 worth of acceptances proves that no continuous credit existed. Richfield's failure to request further advances is not evidence of the non-existence of the credit; the reason for this failure is something which lies within the bosom of Richfield itself. However, appellant may safely guess that Richfield was then precariously close to a receivership and the company probably was not bothering at that time about securing the financing of its Foreign Department. The acceptances were paid on January 6th, less than ten days before the appointment of the receiver. On the other hand, between the 21st day of October, 1930, and the 28th day of November, 1930, the record shows that Richfield did not request the issuance of acceptances although it was still entitled to $20,000.00 worth under the acceptance agreement. Thus the mere lapse of time during which no additional advances were requested is meaningless in so far as its bearing upon the existence of a revolving credit is concerned. Appellant was not obligated to call to the attention of Richfield that it had the right to further credit upon the payment of the first $115,000.00 worth of acceptances, because appellant had from time to time advised it of the maturity date of acceptances and

of the actual payment thereof. (R. 295, 296, 297, 298, 299, 300, 303, 304.)

The creation of a *line* of credit, as testified to by all witnesses; the manner of the Richfield borrowing, namely, under the original credit, but in several installments; the right to cancel demanded by Mr. Lipman (R. 438), and in substance admitted by Mr. Hall (R. 343); and the records of the bank (R. 394, 395, 396), all bespeak the existence of this revolving, or continuous credit. Opposed to this is substantially nothing, except Richfield's neglect from January 6th to January 15th to borrow further under the credit.

But even though no revolving credit was ever created or contemplated, all of the drafts in question were nevertheless deposited as security for acceptances. Here again appellee's case has apparently been constructed on a retrospective view of the facts as they actually happened rather than on the understanding of the parties as of the time of the execution of the acceptance agreement and the deposit of the drafts. It so happened that all of the acceptances were issued within a comparatively short period of time. Since they were to mature at the expiration of ninety days from the date thereof, the 180 day drafts necessarily turned out actually to be unavailable as security for acceptances. This, however, is no proof that they were never deposited as such security. At the time the first Birla Bros. drafts were forwarded to appellant it had no means of knowing when Richfield would avail itself of the balance of the $150,000.00 credit. This might just as well have been at such a later time

that the maturity dates of the acceptances would have been extended beyond the maturity date of the 180 day drafts, in which event they actually would have been of value as security.

Furthermore, just because the acceptances were actually paid as they matured from the proceeds of drafts is not evidence that appellant had any guaranty at the inception of these transactions that such would be the case. Conceivably a great number of the drawees of the drafts might default, failing to pay entirely, or delaying payment for such a period of time that the acceptances would still be unsatisfied at the maturity of the 180 day drafts. In any such event, these drafts would have had actual value as security. These probabilities were sufficient to necessitate the deposit of all drafts as security for all acceptances, and they completely explain the statement of Mr. Lipman to Mr. Hall (hereinbefore quoted) that appellant would be willing to advance money *on Richfield's foreign drafts.*

It is submitted that the foregoing arguments demonstrate that a real and substantial reason existed for the deposit and acceptance of *all* the drafts in question as security for *all* the acceptances, thus completely answering appellee's contention based upon the supposed uselessness of the drafts as security. In many loan transactions, collateral deposited as security turns out to be useless, and yet the fact of the deposit thereof as security cannot thereby be denied.

(d) All Drafts Deposited Were Transmitted, Received and Handled Alike.

The manner in which the acceptance agreement was signed and delivered and the first drafts deposited has been related.

The sight drafts *and* 180 day drafts were deposited and handled in exactly the same manner. A letter of transmittal accompanied each set of drafts covering each shipment. Each of these letters was written in substantially the same language and appellant issued to Richfield receipts for all drafts delivered. (R. 319.)

Starting with the first Birla Bros. transactions on October 8th, Richfield proceeded to send to appellant its drafts with transmittal letters, all in exactly the same form as those first letters, Plaintiff's Exhibits 22 and 23 (R. 266, 267, 268, 269), receiving from appellant in each instance identical deposit receipts for the drafts. The first of these receipts is Plaintiff's Exhibit 24 (R. 271) and refers not alone to the four Birla Bros. drafts, but to the two additional drafts deposited by letters of transmittal of October 8th and 9th. (R. 274, 275, 276, 277.)

The transactions continued, in a manner *exactly* like that relating to the first Birla Bros. drafts, up to the time of the appointment of appellee as receiver. Copies of the letters of transmittal and original deposit receipts relating to these transactions are in evidence included in Plaintiff's Exhibit 40 to 92. (R. 291, 292, 293.) All are identical in form except as to the description of the drafts and shipping documents. Mr. Gilstrap testified (R. 383) and Mr. Pope

admitted (R. 319) that all of the transactions with respect to the forwarding of the drafts to appellant and the receipt thereof by it were handled in exactly the same manner as inaugurated initially with respect to the first four Birla Bros. drafts.

Although appellee claims that some of the drafts were deposited as security for acceptances and some were not, there is nothing in any of the letters of transmittal or the receipts, or in fact in any other contemporaneous document, which indicates such a distinction. All of the drafts undisputedly were transmitted and handled alike, including those here in question.

Finding of Fact No. VII (R. 183, 184) is to the effect that an oral agreement was entered into in August, 1930, by which certain drafts, without in any manner specifying them, were to be deposited for collection only. In other words, they were not to be deposited as security for acceptances. Finding No. VIII (R. 184, 185) is that thereafter the 180 day Birla drafts in question were delivered pursuant to this agreement. In Finding No. XII (R. 184, 185) the Court held that in October, 1930, another agreement, the acceptance agreement, was entered into. And in Finding No. XVI (R. 189) the trial Court found that the Birla Bros. sight drafts were deposited pursuant to such latter agreement. There is not one scintilla of evidence supporting this arbitrary separation of agreements. The fact of the matter is that the two Birla sight drafts and the two 180 day drafts were delivered at the same time, October 8, 1930,

under exactly the same circumstances, and with no distinction, then or thereafter, as to the manner in which they or any other drafts would be handled.

Contrary to the Court's findings, no distinction was ever made or intended to be made; all of the drafts were deposited as security for acceptances; and all were under and part of the transaction which commenced with the delivery of the acceptance agreement on October 6, 1930.

(e) The Manner in Which the Proceeds of the Various Drafts Were Applied to the Payment of Acceptances Refutes Appellee's Contention as to the Distinction Between Drafts.

It is a fact developed upon cross examination of Mr. Pope that the proceeds of certain drafts which supposedly were not deposited under the acceptances were actually applied in payment of acceptances. It is further an accepted fact, developed likewise upon the cross examination of Mr. Pope, that even the proceeds of drafts alleged to have been deposited as security for acceptances and which were paid on acceptances, were not applied against the particular acceptances supposedly issued thereon. (R. 301, 323, 324, 325.)

It is here advisable to refer to the schedule of drafts set out in the Narrative Statement of Evidence (R. 293) and to point out more minutely just which drafts besides those which are here involved were, and which were not, according to the claim of appellee, deposited under the acceptance agreement.

The first of these was draft No. 103024, deposited on October 28, 1931. The goods under

this draft were not shipped and the draft was returned to Richfield.

Draft No. 103025 was deposited on October 28, 1930, no acceptances having been issued at that time. This draft was paid on November 15, 1930, prior to the release on November 28, 1930, of the final series of acceptances in the total sum of $25,000.00.

The history of draft No. 103028 was similar to that of No. 103024, the first to be considered hereinabove.

Appellee claims that drafts Nos. 103027, 113008, 113009 and 113018 fall without the scope of the acceptance agreements because it was estimated, as appellee claims, that due to the length of time which would be required to send the drafts to the foreign country in which the drawee resided, plus the time required to return the proceeds, funds would not be received in San Francisco prior to February 26, 1931, the maturity date of the last acceptance issued in the sum of $25,000. This is an assumption unfounded by any evidence of communications, oral or written, passing between Richfield and appellant. If any such process of reasoning ever took place prior to the time at which this controversy arose, it remained locked in the minds of Mr. Hall and Mr. Pope.

As to drafts Nos. 113021, 113023, 123007, 123008, 123009, 123010, 123013, 123014, 123015, 13103 and 13106, appellee claims that because they were deposited subsequent to the issuance

of the last acceptance and because the amount of drafts which were undisputedly under the acceptance agreements exceeded the amount of the acceptances outstanding, these drafts were not deposited as security for acceptances.

(1) Application of Proceeds.

The manner in which the proceeds of some of these drafts were handled is inconsistent with appellee's contention.

The proceeds of draft No. 113023 were actually applied by appellant, apparently with Richfield's concurrence, to the satisfaction of the last maturing acceptance in the sum of $25,000.00. (R. 229,300.) This was also true of drafts Nos. 123007 (R. 300), 113018 (R. 303,304), 123009 (R. 303,304), and 113009 (R. 303,304).

It is submitted that this treatment of the proceeds of these drafts decisively supports appellant's contention that all of the drafts were deposited as security for acceptances. The acts of the parties bespeak their understanding of the transaction.

(2) So-Called "Draft Reserve".

Elaborate care was taken by counsel for appellee in the course of the trial to present in as effective a manner as possible that part of the correspondence which passed between Wells Fargo Bank & Union Trust Co. and Richfield Oil Company relating to the issuance of acceptances and the existence of a so-called "Draft Reserve." (R. 278,279.) An examination of the transaction as stated by Mr. Gilstrap and

Mr. Leuenberger in behalf of appellant, and as admitted in substance by Mr. Pope, readily explains the machinery under which the drafts were to be issued. The limit of the credit fixed by Mr. Lipman and Mr. Hellman was $150,000.00 (subsequently extended by the sum of $5000.00 at the time of the execution of the second acceptance agreement). Within this total limit of $155,000.00, as testified repeatedly by Mr. Gilstrap and by Mr. Leuenberger, appellant would and did advance moneys to the extent that there was satisfactory security in the form of drafts. Thus, for example, appellant would not issue acceptances for more than one-half of the shipment against Birla Bros. (that is, the sight drafts), and would not take as a "basis" (in the numerous admissions of Pope) or as a measure, as the testimony of Hall and Leuenberger sets forth, the 180 day drafts upon Birla Bros. In determining whether Richfield could have additional acceptances issued within the $155,000.00 limit, it was from time to time essential to examine the drafts then on deposit and to decide whether the security therefor was satisfactory, *measured* by or *based* upon these drafts, but with all of the drafts as *security;* if it was, the acceptances were then accepted by the bank and sold. In this connection it is important to note that the words "draft reserve" first came into these transactions as a result of letters written by Pope himself, admittedly a novice in dealings of this kind. Gilstrap testified (R. 384) that he adopted Pope's language. Thereafter "draft reserve" appeared several times in the correspondence.

(3) So-Called "Earmarked" Drafts.

Appellee also placed great reliance at the trial on the statement in a letter written by appellant to Richfield, dated October 21, 1930 (R. 282) to the effect that appellant had "earmarked" draft No. 103010 against the acceptance in the sum of $10,000.00 maturing on January 19, 1931. Appellee reasons from this that each draft was tied to a particular acceptance and was security for no other acceptance.

The letter from appellant to Richfield, dated January 3, 1931, marked Plaintiff's Exhibit 95 (R. 296) sets forth the manner in which the proceeds of this draft No. 103010 were finally applied. The letter shows that the first $115,000.00 worth of acceptances matured on January 6, 1931, the second acceptance for $5000.00 on January 13, 1931, and the third acceptance for $10,000.00, against which draft No. 103010 was supposed to have been "earmarked," on January 19, 1931. At the time this letter was written the only proceeds of drafts which appellant had on hand were those of the first two Birla Bros. sight drafts and those of draft No. 103010. After the satisfaction of the $115,000.00 worth of acceptances, the sum of $4626.05 remained of the proceeds of the two Birla Bros. drafts. Since this was not enough to satisfy the $5000.00 acceptance maturing on January 13, 1931, it became necessary to use part of the proceeds of the so-called "earmarked" draft for this purpose. Furthermore, after complete satisfaction of the $10,000.00 acceptance against which this draft was alleged to have been earmarked, some $600.00 remained to be applied on the final $25,000.00 worth

of acceptances. This same letter of January 3, 1931, shows clearly that the proceeds of the two Birla Bros. drafts and of the so-called earmarked draft were indiscriminately applied to the satisfaction of the three sets of drafts totalling $130,000.00, instead of being confined to the particular acceptances for which appellee contends they were "earmarked". In this indiscriminate application Richfield concurred. Despite the vehement assertion of appellee at the trial that draft No. 103010 was earmarked against the $10,000.00 acceptance maturing on January 19, 1931, and was security solely for this acceptance, there is no evidence that Richfield at any time demanded that appellant turn over to it the balance of $991.07 of the proceeds over and above the amount of the acceptance. Richfield would certainly have been entitled to the payment to it of this surplus if the present claim of appellee had been the understanding of the parties. The manner in which the proceeds of this draft were applied, on the other hand, demonstrates again that all of the drafts deposited were security for each and every acceptance issued.

(f) Comparison of the Records Kept by the Parties to the Transaction.

Appellee has contended that Richfield Oil Co. understood the transaction as involving the deposit of only certain specified drafts under the Acceptance Agreement. Appellant, on the other hand, contends that there was but one transaction and that all the drafts were deposited under the acceptance agreements as security for acceptances. Assuming that both appellee and appellant are honest in their respective conten-

tions, it is particularly important to compare the records kept by the Richfield Oil Company and those of appellant during the course of the transaction. There was neither offered nor introduced in evidence a single original record, book or document of Richfield Oil Company showing that during the operation of the acceptance agreement and the forwarding of the drafts, or, indeed, at any time, a distinction was made between the drafts with respect to their relationship to the acceptances and the acceptance agreement.

As to the Richfield Oil Company's records, Mr. Pope testified that he kept "little pencil memorandums" showing what particular drafts were, according to his understanding, under the acceptances. (R. 305.) This is the sole evidence as to any records kept by Richfield Oil Company with respect to the drafts allegedly under the acceptance agreement or security for the acceptances. There was no evidence introduced as to where or how or when these "little pencil memorandums" were kept, nor were they produced at the trial. The record is clear that there was no communication from Richfield to appellant of the pencil memoranda or of any other records or list of drafts purportedly under the acceptance agreement. On the other hand, the communications which Richfield directed to appellant consisted of letters of transmittal accompanying the drafts, each in exactly the same form and couched in the same language as the letters marked Plaintiff's Exhibits 22 and 23 (R. 266, 267, 268, 269), which started the transaction.

As opposed to the doubtfully effective "little pencil memorandums" of Richfield Oil Company are the

permanent records of appellant. Mr. Gilstrap, corroborated by the witness Mr. Desmond, a clerk in the Foreign Department of appellant, testified that the permanent record of each draft deposited with and transmitted by it to its foreign correspondent for collection, consisted of a copy of the remittance letter addressed to the correspondent bank, containing a detailed description of the draft and accompanying documents. (R. 377, 378, 379.) There was offered, and received in evidence four such transmittal letters, marked at the trial Defendant's Exhibits "F," "G," "H" and "I" (R. 380, 381, 382), relating respectively to draft No. 103006-A (sight draft on Birla Bros. for $55,900.76), draft No. 103006-B (180 day draft on Birla Bros. for $55,900.75), draft No. 103004 (sight draft on Birla Bros. for $63,950), and draft No. 103005 (180 day draft on Birla Bros. for $63,950). These first four letters of transmittal from appellant to its Calcutta correspondent relate to the first four Birla Bros. drafts, including the two 180 day drafts, the proceeds of which constitute the principal part of the sum in issue in this litigation. In the right hand corner of each of the four carbon copies of letters of transmittal, which as previously stated, constitute appellant's permanent records of the transaction, there were written in pencil the words "Security for acceptances, proceeds to Clemo." The testimony of Gilstrap, supported by Desmond, is clear to the effect that these copies of letters of transmittal were regular records of appellant; that they were the first permanent records, and were kept in the ordinary course of business. Gilstrap further testified, both

on direct and on cross examination, that in order to start the new transaction in the proper manner he instructed the clerk, Desmond, to make the notation in question upon the first few file copies of the letters of transmittal relating to Richfield drafts (Gilstrap's testimony, R. 378, 379; Desmond's testimony, R. 423, 424). Gilstrap testified that:

> "This was the first transaction we had had with Richfield, and I wanted to be sure there could be no mistake made about these bills being security for acceptances, and as an initial transaction we wanted to be sure to start it correctly."
> (R. 380.)

Subsequently he said:

> "When I handed the first four Birla Bros. drafts to the clerk in charge of the foreign collections, who is Mr. Desmond, I told him we were advancing the Richfield Oil Company against the collections certain amounts by means of acceptances, and that I wanted him to be sure to make a proper memorandum so that the proceeds of these collections, when they were received, would be handed to Mr. Clemo, the man who handled the acceptance finances."
> (R. 415.)

Mr. Desmond testified, despite arduous efforts of counsel to break him down, that the writing was his and was made contemporaneously with the receipt of the drafts and instructions from Mr. Gilstrap. (R. 423, 424.) Thus the file copies of all of the first letters of transmittal relating to Richfield drafts which went from appellant to its correspondents had the same

pencil notation upon them. After the transaction was well under way, the same notation no longer appeared upon file copies.

In the course of the trial, Counsel for appellee demanded of Mr. Gilstrap that he produce all the records of appellant relating to the acceptance transaction with Richfield Oil Company. In response to this, Mr. Gilstrap produced a ledger sheet which appellee offered in evidence and which was received and designated as Plaintiff's Exhibit 122. (R. 394, 395, 396.) An examination of this ledger page discloses that after the entry of the original advance of $115,000.00 on October 6, 1930, the first entries in the column entitled "documents drawn against", are "Silver Ray" and 17,400 cases of kerosene and 540 drums of fuel oil. Next thereafter is the name "Silver Hazel" and 95,000 cases of kerosene. (R. 394.) In explaining these entries, Mr. Gilstrap testified that "Silver Hazel" and "Silver Ray" referred to the names of the two boats carrying the Birla Bros. shipments (R. 396, 412), and that the reference to kerosene and fuel oil was a description of the shipments which went forward thereon (R. 412); furthermore, that these were the shipments to Birla Bros. represented respectively by the two sets of drafts,—two at sight and two at 180 days, drawn by Richfield Oil Company upon Birla Bros. (R. 412.) An examination of Plaintiff's Exhibits 22 and 23 (R. 266, 267, 268, 269), being the letters of transmittal with reference to the first Birla Bros. drafts, will immediately disclose that "Silver Ray" and "Silver Hazel" were the two boats upon which the shipments went forward.

According to its own records, duly identified and established, it is apparent that appellant complied with the instructions contained in the previously mentioned letter of Mr. Lyons, Comptroller of Richfield Oil Company (R. 316) to issue $115,000.00 worth of acceptances *against* the entire shipment to Birla Bros. evidenced by the four drafts, two at sight and two at 180 days. This is verified not only by Exhibit 122, but also by the notations upon the filed copies of appellant's letters of transmittal hereinbefore referred to. (Defendant's Exhibits "F", "G", "H", and "I".)

In view of the clear and convincing records of appellant, consistent with the testimony of its officers and employees, and in view of the uncertain and nebulous records, if any, of Richfield, no doubt remains as to the nature and operation of the acceptance credit. *There was only one transaction inaugurated by and under the acceptance agreement—all drafts transmitted to appellant by Richfield Oil Company were deposited under the agreement as security for the acceptances; being thus deposited, they became, by operation of the terms of the agreement, security for the general indebtedness of Richfield to appellant.*

(g) The Legal Effect of the Terms of the Acceptance Agreement.

If appellant is correct in its foregoing contentions that all of the drafts, and particularly those whose proceeds are involved in this litigation, were deposited under and pursuant to the acceptance agreement, then the provision of the acceptance agreement hereinbefore set forth that

> "all bills of lading * * * money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you * * *"

clearly gave appellant the right to apply the proceeds of the drafts to the satisfaction of the general indebtedness of Richfield to appellant in the sum of $625,000.00. It is well settled that such a provision as this gives the security holder the right to apply the security to all indebtedness due from the mortgagor or pledgor, taking the case out of the rule stated in *Berry v. Bank of Bakersfield* (1918) 177 Cal. 206, 170 Pac. 415, that a bank has no general lien upon collateral pledged to secure only a specific debt.

In *Commerce & Savings Bank v. Robert H. Jenks Lumber Co.* (1911) 194 Fed. 732, a note executed by the defendant in favor of the plaintiff bank contained a provision as follows:

> "The undersigned, having herewith deposited as collateral security for the payment of this and every other liability of the undersigned to said bank, direct or contingent, due or to become due, or which may hereafter be contracted or existing * * *"

The Court said at page 735:

> "Considering the fact that this lumber company was a large borrower of the bank, and considering this plain and precise language, which could not be any plainer, there seems but little doubt but that the Union National Bank has a right

> to hold these 304 shares of capital stock * * * as collateral not only for the $20,000 set forth in the specific note above referred to, but also for the indebtedness of every kind of the Robert H. Jenks Lumber Co. to the bank. Language not as comprehensive nor as specific as that employed in this note in question has been held by several of the highest courts of the state to mean that the collateral was not given for the specific indebtedness of the note alone, but for all of the indebtedness."

In *Citizens Bank v. Thornton* (1909) 174 Fed. 752, the provisions in a note given to the bank stated that the collateral pledged therewith was

> "* * * to secure the payment of this or any other obligation upon which the owner shall be in any way bound primarily or secondarily, due or to become due."

The Court said, at page 762:

> "Apter language could not be used to convey the intent to pledge the collateral for the protection of 'any other debt' the pledgor might contract thereafter. The original Buckmaster and Williams note, which the parties recognized as one of the debts for which appellee was liable, was outstanding at the time the deposit of collateral was made. By its express terms the pledge secured 'any other debt due or to become due' * * * We cannot doubt that the collateral in the hands of the receiver is subject under the terms of the pledge to the satisfaction of the principal and interest due upon the Buckmaster and Williams note in suit."

To the same effect see:

Foster v. Abrahams (1925) 74 Cal. App. 521, 241 Pac. 274;

Selma Bridge Co. v. Harris (1898 Ala.) 31 So. 508;

Boni & Harper Milling Co. v. Stevenson Co. (1913 N. C.) 77 S. E. 676;

Bank v. de Mere (1894 Ga.) 19 S. E. 38;

Beacon Trust Co. v. Robbins (1899 Mass.) 53 N. E. 868;

Stanley v. Bank (1896 Ill.) 46 N. E. 273.

(h) The Terms of the Acceptance Agreement With Respect to Security Cannot be Altered by Parol Evidence.

Since the drafts in question were, as appellant claims, deposited under the acceptance agreement, parol evidence to the effect that they were to be security for a particular indebtedness only is inadmissible.

In *National Bank of Rochester v. Erion-Haines Realty Co.* (1928) 232 N. Y. S. 57, a mortgage provided that it was a continuing and collateral security for the payment of any and all indebtedness of the mortgagors to the bank, then existing or at any time thereafter arising by reason of the notes, drafts, or other obligations of the mortgagors. Defendants claimed, in the same manner as appellee in the case at bar, that it was orally agreed that the bond and mortgage should be and remain not general collateral according to its terms, but security for the note in suit only. The Court said, at page 59:

> "The bond and mortgage in suit are broad and general in their terms as against their makers. * * * Even if the proof introduced by defendants is sufficient to establish the claimed oral agreement preceding or attending the making and delivery of the bond and mortgage in February, 1914—to the effect that the instruments in question in the possession of the Bank of Commerce were held as collateral to the note in suit and its predecessors and to no other notes or indebtedness —receipt of such proof in evidence was error in that it tended to vary the terms of a written instrument contemporaneously or subsequently executed."

In *First National Bank of Langdon v. Prior* (1901 N. D.) 86 N. W. 362, it was held that a prior or contemporaneous oral agreement made by a mortgagee or his agent that upon payment of two notes the mortgage would be released, is not admissible in evidence where the mortgage provided absolutely that it should be security for four notes.

The two foregoing cases have been cited merely to show the precise application of the general parol evidence rule to the particular facts of the case at bar.

(i) Appellee Must Bear the Burden of Proving That the Drafts in Question Were Not Deposited Under the Acceptance Agreements.

At the trial of this action, counsel for appellee attempted to impose upon appellant the burden of proving that the 180 day drafts drawn on Birla Bros. were deposited with appellant under the acceptance

agreements. They contended in substance that if no evidence were introduced on either side on this point, appellee would have been entitled to a finding that these drafts were not deposited under the acceptance agreements. This conclusion is entirely unwarranted and erroneous. It is elementary that the burden of proving a fact rests upon one who has the affirmative of the issue.

In paragraph VII of appellee's ancillary amended bill of complaint (R. 74, 75) an allegation is set forth to the effect that the 180 day drafts were deposited with appellant under an agreement entered into in August, 1930. Contained in paragraph VIII (R. 77, 78, 79) of said amended bill is an allegation that other drafts were deposited under an acceptance agreement entered into in October. Thus, appellee alleged the existence of two separate contracts.

In paragraph V of its answer (R. 104, 105) appellant denies that there was any such agreement as set forth in paragraph VII of the amended bill, and "with respect to the agreement under which said drafts were deposited", appellant averred that the only agreement was one entitled "Acceptance Agreement". In paragraph VI of appellant's answer (R. 105, 106, 107, 108) it denied that any agreement was made with Richfield Oil Company of California with respect to said drafts except said acceptance agreement. Thus, appellant denied negatively the existence of two agreements as alleged by appellee and further denied affirmatively the existence of such two agreements by alleging that there was only one agreement.

That the burden rests upon one having the affirmative of the issue and that the pleading of an affirmative denial does not shift the burden was held in

Scott v. Wood (1889) 81 Cal. 398, 22 Pac. 871.

In that case the plaintiff brought an action to recover for services rendered under a contract in which, as alleged, defendant agreed to pay $250.00 per month. The answer averred that subsequent to the time when the contract was entered into, it was agreed that the salary of plaintiff should be $200.00 per month. The Court held that the burden of proof rested on the plaintiff, saying at page 400:

> "The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of evidence. * * * The two burdens are distinct things. One may shift back and forth with the ebb and flow of testimony. *The other remains with the party upon whom it is cast by the pleadings—that is to say, with the party who has the affirmative of the issue.*" (Italics ours.)

In the same case, at page 404, the Court said:

> "But we treat the complaint as sufficiently alleging that the rate did, in fact, continue as it commenced. This essential allegation was put in issue by the answer. It averred affirmatively a different agreement made shortly after the one stated in the complaint and denied that there was any subsequent agreement. This was sufficient to raise an issue as to the continuance of the rate alleged. *The fact that the traverse was affirmative*

and not purely negative in form would not destroy its force nor change its essential nature." (Italics ours.)

In *Gilman v. Bortz* (1883) 63 Cal. 120, the *per curiam* opinion sufficiently states the facts and the decision as follows:

"The court below must have denied the motion for a nonsuit on the ground that the answer failed to deny the allegations of the complaint, except as to the assignment to the plaintiff. In so construing the answer the court misconceived its meaning. The answer denied that the sale was for $800 in Gold Coin, as alleged in the complaint, and then proceeded to aver that the contract of sale was for $400 in money, and for $400 in boarding the plaintiff. This was in legal effect to deny that the sale was for $800 or on any other terms than as set forth in the subsequent averments of the answer above stated. When, then, the plaintiff only offered the assignment to him and rested, he had offered no evidence to establish the main allegation of his complaint, and the nonsuit should have been granted."

In *Murphy v. Napa County* (1862) 20 Cal. 497, plaintiff sued to recover a certain sum for work done and materials furnished in repairing a bridge. The answer denied the making of the contract with plaintiff and averred that a certain other contract was the only one between the parties. The Court said, at page 503:

"The complaint must be understood as averring a contract in accordance with the statute, and we think the answer sufficiently denies the making

> of such a contract. It is awkwardly drawn, and lacks in many respects the perspicuity and precision desirable in the pleading; but it denies in a plain and unequivocal form the making of any contract with the plaintiff. It admits a contract with the plaintiff and one Williston, and avers that this was the only contract made by the defendant in relation to the matter, and denies that the board of supervisors made any other. *This was sufficient to put plaintiff upon proof of the contract, and the evidence in the case did not entitle him to recover.*" (Italics ours.)

To the effect that the burden of proof rests upon the party who has the affirmative of the issue, see:

Koyer v. Wellman (1909) 12 Cal. App. 87, 106 Pac. 599;

Ruth v. Krone (1909) 10 Cal. App. 770, 103 Pac. 960;

Valente v. Sierra Ry. Co. (1907) 151 Cal. 534, 91 Pac. 481.

As a result therefore of the holdings of these cases, the burden here rests upon appellee to prove the existence of the two contracts alleged, and if he fails to do so by a preponderance of the evidence, appellant is entitled to a finding that the drafts were all deposited under the acceptance agreement. It is submitted that in the light of all the evidence adduced at the trial, as set forth in the Narrative Statement of Evidence and as summarized herein, appellee has failed to prove by a preponderance of evidence the existence of the two contracts alleged and has failed to prove that the drafts involved herein were not deposited under the acceptance agreement.

At the trial, appellee relied upon the case, of *Roche v. Baldwin* (1904) 143 Cal. 186, 76 Pac. 956; *Cusick v. Boyne* (1905) 1 Cal. App. 643, 82 Pac. 985; *Melone v. Ruffino* (1900) 129 Cal. 514, 518, 62 Pac. 93; *Gerald v. Irvine* (1929) 97 Cal. App. 377, 275 Pac. 840, *De Laval Dairy Supply Co. v. Stedman* (1907) 96 Cal. App. 651, 92 Pac. 877; *Gett v. Pacific Gas & Electric Co.* (1923) 192 Cal. 621, 623, 221 Pac. 376; *O'Neill v. Caledonia Ins. Co.* (1913) 166 Cal. 310, 135 Pac. 1121, as showing that the burden of proof rested upon appellant. These cases, however, do not militate against the conclusion of appellant that the burden in the instant matter rests upon appellee. They all involved pleadings by way of confession and avoidance, which, of course, placed upon the defendants therein the burden of proving their allegations.

IV.

EVEN IF THE DRAFTS IN LITIGATION WERE NOT DEPOSITED UNDER THE ACCEPTANCE AGREEMENT, THEY ARE SUBJECT TO DEFENDANT'S BANKER'S LIEN AND RIGHT OF SET-OFF.

If the drafts, the proceeds of which are the subject of this action, were deposited under the acceptance agreement, as appellant contends and as heretofore argued, they necessarily were subject to the terms thereof, and by virtue of the contract became security not alone for the acceptance indebtedness of the Richfield Oil Company to the appellant bank, but for any and all other indebtedness of Richfield to appellant. If, on the other hand, notwithstanding the overwhelm-

ing weight of evidence to the contrary, the drafts in question are held not to have been deposited under the acceptance agreement, then, nevertheless, they and the proceeds thereof were still subject to the appellant's banker's lien and right of offset. Appellant submits that appellee's cause must be impaled on either horn of this dilemma. Any relief which appellee claims under the second alternative depends upon the existence of a definite and binding agreement by the appellant to waive its banker's lien and right of set-off. This relief is not available to appellee if the case falls under the first alternative because of the parol evidence rule. In view of the terms of the acceptance agreement, the rule of *Berry v. Bank of Bakersfield* (supra) is not applicable if the drafts were deposited under the agreement, nor is it applicable even if the drafts are held not to have been so deposited. Unless it be pursuant to the terms of the acceptance agreement there was here no *specific indebtedness* for which the drafts were pledged as security.

The lower Court held that appellant waived its right to banker's lien upon the drafts in question at the outset of the transaction. (Finding VII, R. 183, 184; Conclusion III, R. 194.) This is specified as error. (Assignments Nos. III, IV, V, VI and VII, R. 479, 480, 481.)

(a) Statement of the Rule Regarding Banker's Liens.

The statement of the general rule of banker's liens appears frequently in statutes and decisions. Thus in California, Section 3054 of the Civil Code, codifying

the law of banker's liens as it previously existed, provides:

> "A banker has a general lien, dependent upon possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer, in the course of business."

In *American Surety Company v. Bank of Italy* (1923) 63 Cal. App. 149, 218 Pac. 466, the following appears:

> "It is settled law, and, indeed, as above indicated, it is expressly so provided by the law of this State (Civil Code, Section 3054), that a banker has a lien upon and so is vested with the right to appropriate any money or property in his possession belonging to a customer to the extinguishment of any matured indebtedness of such customer to the bank to the full extent of the money or property so possessed, if necessary, and so far as it may go toward such extinguishment, provided, of course, that such property or money so deposited has not been charged, with the knowledge of the bank, with the subservience of a special burden or purpose, or does not constitute a trust fund of which the banker had notice."

In 5 *Michie, Banks and Banking,* page 212, is found the following explanation of Banker's Lien:

> "The rule that a bank has a general lien upon or right of setoff against all moneys or funds in its possession belonging to a depositor to secure the payment of the depositor's indebtedness to it, is a part of the law merchant and well established in commercial transactions. The rule may be broadly stated that the bank has a general

lien upon all moneys and funds of a depositor in its possession for the balance of the general account, though the lien is only for accounts that are at the time due and payable. The rule rests upon the principle that as the depositor is indebted to the bank upon a demand which is due, the funds in its possession may properly and justly be applied in payment of such debt, and it has therefore a right to retain such funds until payment is actually made. The lien is given upon the theory that any credit the bank extends to its customer by way of loan or overdraft is given on the faith that money or securities sufficient to meet the debt at its maturity will come into the possession of the bank to discharge the same."

The rule and its purposes are well stated in *Citizens Bank & Trust Co. v. Yantis* (1926, Tex.) 287 S. W. 505. In this case the Court said, at page 507:

"We think it is clear from the authorities that, when a note or other security is placed in a bank by its customer for collection or for general account, in respect to mutual dealings as such, the bank has a lien upon the note or its proceeds to secure the payment of past due indebtedness. Likewise after maturity of its indebtedness it is authorized to apply any proceeds when collected to the payment of its indebtedness * * * This doctrine is not dependent solely upon any express agreement, but arises by implication growing out of the relationship of the depositor and the bank. It is a wholesome rule, and presupposes that for such accommodations extended by the bank, the bankable paper delivered to it will stand charged with a lien upon the proceeds."

As shown by the case last cited, the banker's lien attaches *even to commercial paper deposited with the bank for collection.*

In *Goodwin v. Barre Trust Co.* (1917, Vt.), 100 Atl. 34, the Court said, at page 37:

> "By a peculiar rule of the law merchant, which has come down to us through the common law of England, a banker has a lien on the securities and funds of his customer which come into his possession in the regular course of business as banker, and has the right to set off any matured debt against such funds without direction or authority from such customer. This lien and right of setoff applies not only to a general deposit of the customer, *but to any business paper belonging to him which he entrusts to the bank for collection, and to the avails thereof.*" (Italics ours.)

The rule is stated in *Garrison v. Union Trust Co.* (1905, Mich.) 102 N. W. 978, at page 980, as follows:

> "The general lien of bankers is part of the law merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account is undisputed * * * *and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right and placed by him with the bank for collection.*" (Italics ours.)

To the same effect see:

Muench v. Bank, 11 Mo. App. 144;
Joyce v. Auten (1900) 179 U. S. 591.

(b) The Conclusion of the Trial Court That Appellant Waived Its Banker's Lien Is Not Warranted by the Circumstances Surrounding the Original Transaction.

The evidence upon which appellee mainly relies in support of his contention that appellant waived its banker's lien is the testimony of Mr. Hall and Mr. Pope to the effect that Hall informed Gilstrap, Leuenberger and Lipman of appellant bank that it was to be understood that all transactions of Richfield with the Foreign Department of appellant were to be kept separate and apart from all other financial transactions of Richfield with appellant.

Mr. Hall's testimony is as follows:

> "I stated to him (Lipman) at that time my employment at the Richfield Oil Company, and I asked him to remember that any transactions were to be considered separate from other transactions of the Richfield, that is, the entire transactions, monetary, the collections of drafts for us or any other business connected with the Foreign Department of Richfield Oil Company." (R. 340.)

In this regard, Mr. Lipman's testimony, upon which counsel for appellee greatly rely, is as follows:

> "It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the Foreign Department and not the general treasury relations of the company, and he did not want the two mixed up; he wanted them kept separately. No discussion was had at that conference with respect to a banker's lien." (R. 449.)

These statements constitute appellee's strongest evidence to support the alleged waiver by appellant of its banker's lien or right of set-off.

It is apparent at once that the record is devoid of any *specific* agreement of waiver.

Mr. Hall at the time of contacting the officials of appellant bank, in August and October, 1930, was well aware of the heavy indebtedness of Richfield to appellant. Moreover, he was familiar with the right of a bank to a lien and offset against commercial paper and the proceeds thereof deposited with it in the ordinary course of business. (R. 340, 341.) Yet, despite this, Mr. Hall never at any time mentioned banker's liens or rights of offset to the officials of appellant. It is indeed singular that a man who was familiar with the lien of banks and the indebtedness of his company to appellant, and who, as he now asserts, intended to procure a promise from appellant waiving its lien upon the drafts in question, would resort to such weak and ambiguous language as that upon which appellee here relies as constituting an agreement of waiver. If Mr. Hall intended to prevent appellant from exercising a banker's lien, why did he not expressly and specifically tell the officials of appellant bank that he would only deposit Richfield Oil Company's foreign drafts for collection provided that appellant would agree to waive its lien or right of offset? The answer is quite obvious:—he did not intend any such thing, and the use of the statements of Hall as a basis for this action is an afterthought of the receiver to deprive appellant of its right to

retain the proceeds of the drafts in question. To suppose that a man who intended to procure a promise to waive a banker's lien would use the language here relied upon without even mentioning the allegedly intended waiver offends common sense.

Shortly before the commencement of the negotiations between Hall and the officials of the bank, appellant, as has hereinbefore been mentioned, loaned a large sum of money to Richfield Oil Company on an unsecured note, thereby exhibiting great confidence in the financial stability of the company. There is no evidence in this case, at the time of Hall's visits to San Francisco, of any indication of the possibility of receivership for Richfield. Under the undisputed facts there was no necessity, as far as the circumstances were then understood by the aprties to the acceptance transaction, for an agreement waiving lien.

In such a situation, how can the conclusion reasonably be reached that officials of appellant knew or should have known that Hall, by the use of the statements in question, intended to bring about a waiver of appellant's banker's lien, assuming that he actually did so intend? Under the circumstances the wildest stretch of the imagination would not have given an inkling that Mr. Hall might possibly have been intending to procure a waiver of such lien. It is wholly unreasonable that the officials of appellant should now be held to the necessity of interpreting at their peril the alleged, somewhat unintelligible, statements of Mr. Hall in the manner appellee now contends they should have been interpreted.

(1) Appellee's Argument is not Supported Even by the Testimony of His Witnesses.

It has been hereinbefore intimated that appellee's case was artificially constructed from strained inferences and from a retrospective view of transactions occurring subsequent to the execution of the acceptance agreement. As illustrative of this artificiality is the argument made by counsel for appellee in the lower court to the effect that there was a distinct agreement, intended by the parties to apply *only* to those drafts which, according to appellee's contention, were not to be deposited under the acceptance agreement, that such draft collections were to be kept separate and apart from other transactions of Richfield Oil Company and appellant, while those drafts deposited under the acceptance agreement were not to be kept so separate and apart. This argument was accepted by the lower Court and is embodied in Findings Nos. VII, VIII, XII, XIII, XVI and XVII. (R. 183, 184, 185, 187, 188, 189, 190.) The complete lack of foundation for this is found in the evidence produced by appellee himself. Mr. Hall's testimony as to the separateness of the acceptance transactions is general in nature and makes no distinction between drafts to be deposited under the acceptance agreement and those not to be deposited thereunder. According to him, *all* transactions with the Foreign Department of appellant were to be kept separate and apart. (R. 341, 343, 346.) Mr. Pope's testimony is to the same effect. (R. 264.)

The all-embracing statements of Hall most decisively refute the argument of appellee that in making them,

a contract to waive banker's lien was intended. *All* of the draft transactions were to be kept separate and apart, and yet admittedly a great many drafts were to be deposited under the acceptance agreement. In the face of a supposed intention that banker's lien was to be waived, two of the highest officers of Richfield Oil Company signed an acceptance agreement which contractually bestowed upon appellant the same rights as those provided by the law of banker's lien. Hall was present when Pope delivered this acceptance agreement to appellee, and moreover he saw the agreement before delivering it. (R. 360, 361.)

The existence of an intention to waive the right to banker's lien, arising from an agreement that *all* draft transactions were to be kept separate and apart, and the admitted existence of an agreement providing that at least some of the drafts were in effect to be subject to a lien, are inconsistent. This inconsistency effectively demonstrates that Hall was never imbued with the intention of procuring a waiver of lien when he made the statement, as he claims, that the Foreign Department transactions were to be kept separate and apart.

(2) The Real Intention of Mr. Hall.

In its opinion, the lower Court stated that it was admitted by appellant that the remarks alleged to have been made by Mr. Hall regarding the separate and apart character of the foreign transactions, were actually made. (R. 174.) This was not true. All witnesses for appellant, except Mr. Lipman, deny that Hall made these statements. And Mr. Lipman's

testimony substantially qualifies appellee's version of the Hall words, as will hereinafter be shown.

But even accepting the truth of Hall's statements, what he meant must on analysis appear quite obvious. Throughout his testimony he coupled his language as to keeping the transactions separate with the announcement that he had an interest in the Foreign Department collections. (R. 341, 343, 350.) He wanted his department to receive them so that he might in turn collect his commissions. Moreover, he was endeavoring to establish a new loan line with Wells Fargo Bank, based upon foreign collections. He had no power to bind the treasury department of Richfield. In fact, he told Gilstrap that he would have to take the matter up for approval with the treasury officials in Los Angeles. (R. 358.) Certainly, he could not expect to have the transaction approved if the new loan line was to reduce the $625,000.00 line which Richfield Oil Company had with appellant at that time. In other words, it was to be a separate loan. The logic of this construction of Hall's testimony is supported by that of Hellman. In recounting what Hall said to Lipman (and in checking the accuracy of Hall's statement, it is interesting to note that Hall denied that Hellman was present at the conference). (R. 343.) Hellman stated:

> "* * * he said, 'You must realize that I am not in the financial end of the business; that I am only the Manager of the Foreign Department, and I will have to get the consent of my superiors to get this credit through.' He further said that he knew we were giving them a line

> of credit of $625,000.00, and that if this acceptance credit was going to interfere with the loan line downstairs, he knew that they would not consent to it, and he wanted the acceptance credits separate from the loan downstairs." (R. 438.)

At the trial, counsel for appellee placed great reliance on the testimony of Mr. Lipman regarding the statements of Mr. Hall to him. Counsel were apparently so confident that his testimony supported their side of the case they waived cross-examination of Mr. Lipman, whereas all the other witnesses were subjected to minute and lengthy cross-examinations. Mr. Lipman's testimony in this regard is as follows:

> "It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the Foreign Department and not the general treasury relations of the company, and he did not want the two mixed up; he wanted them kept separately. No discussion was had at that conference with respect to a banker's lien." (R. 449.)

These words, instead of supporting appellee's position, explained the reason for the desire to keep the transaction separate. Hall could not speak for the treasury of his company, but only for the Foreign Department. Furthermore, Richfield obviously desired that its borrowing power in each separate credit line should not interfere with any other loan arrangements. Mr. Hellman's testimony corroborates this clearly. It was important therefore that the foreign transactions be separate from other transactions, but this is certainly far removed from an agreement, express or

even by legal implication, that appellant would waive its banker's lien and right of set-off.

(3) Comparison of Hall's Testimony With That of Witnesses for Appellant.

It is interesting to note that Mr. Hall was not content with testifying that he once or twice said to the officials of appellant bank that the transaction was to be kept separate and apart, and that he had an interest therein, but he took particular pains to repeat that story in almost the precise words a great number of times throughout his direct and cross-examination. He indicated that at every conference this statement was made. Frankly, appellant doubts this, and doubts whether it was ever emphasized during the course of the negotiations. Appellant doubts it as it does the accuracy of Mr. Hall's memory of the transactions. Repeatedly in his testimony at the trial, he contradicted statements made in his deposition. (R. 352, 353, 354, 356, 357, 363.) In fact, anticipating that such a thing would occur, counsel for appellee carefully elicited from Mr. Hall statements about his worried, rushed and uncertain condition when he gave his deposition (R. 339, 366), and yet Hall's physical condition for the past few years, his state of nervousness and stress (R. 351) lead logically to the conclusion that he was better able to remember the transaction at the time of his deposition, given almost a year before the trial, than at the trial itself. In passing, it should be noted that Hall claimed an interest in the proceeds of the drafts concerned in this litigation although the receiver has to date defeated his claim. (R. 354.)

As opposed to the discoursive testimony of Mr. Hall, we have the positive and definite statements of Gilstrap, Hellman and Leuenberger of appellant bank, that never once in the course of these transactions did Mr. Hall state that the business with the Foreign Department was to be kept separate and apart. (R. 370, 375, 376, 436, 437, 429.) And Mr. Lipman, on whose testimony appellee places great faith, stated that he had no recollection of any statement in which Mr. Hall told him that Hall had an interest in the transaction, and if such a statement had been made he would definitely have remembered it. (R. 449.) Gilstrap, Hellman and Leuenberger deny, with a positiveness equal to their denial of the alleged statements as to the separate nature of the transactions, that Hall ever disclosed that he had any interest in the transactions of the Foreign Department. (R. 369, 375, 376, 437, 428.)

The statements of Hall made subsequent to May 8, 1931 (R. 350), when the appellant bank announced that it was exercising its banker's lien, are obviously irrelevant to these proceedings. In this connection Mr. Gilstrap testified that he believed Mr. Hall made mention on his visit after May 8th of having an interest in the transactions and asserted an agreement that the Foreign Department business was to be separate from the other affairs of Richfield Oil Company. (R. 388.) This, as a frank admission, strengthens rather than weakens Gilstrap's testimony with respect to what transpired before the exercise of the lien. Neither Hellman nor Eisenbach nor Motherwell recall any such statement made to them by Hall at the con-

ferences subsequent to May 8, 1931. (R. 440, 458, 461, 462.)

(4) The Improbability of the Existence of an Agreement Waiving Lien.

Appellant submits, moreover, that the probabilities are against there having been any agreement on the part of appellant bank directly or indirectly to waive its banker's lien or right of set-off. Notwithstanding Hall's testimony as to his familiarity with such rights, it is seldom, if ever, that the parties contemplate the existence of, or negotiate with respect to, banker's liens or rights of set-off at the time when a loan is made.

Notwithstanding the inference of counsel for appellee during the trial, that in the fall of 1930, Wells Fargo Bank might have been worried about the financial condition of Richfield Oil Company, the record is clear that the original note of Richfield was renewed in July of the same year, an additional loan of $125,000.00 being then made, and that Mr. Lipman considered the loan good. Appellant submits that not alone was the so-called "separate and apart" agreement not made, but even if it was, neither Hall nor appellant contemplated or dealt with the right of lien or set-off.

(c) The Conclusion of the Trial Court That Appellant Waived Its Lien Is Not Warranted as a Matter of Law.

Appellee argued, and the lower Court held, that the statements of Mr. Hall upon which appellee relies, caused the drafts of Richfield to be deposited as a trust or as a special deposit. In support of this posi-

tion, a number of authorities were cited, which will be hereinafter discussed. If the statement that the drafts in question were to be kept separate and distinct from all other financial transactions between Richfield and appellant gives any assistance to appellee's case, it does not amount to the creation of a special deposit or trust, but to an agreement that the defendant would waive its lien or right of set-off. That such a statement would not amount even to this has been heretofore discussed on the facts and will be shown presently as a matter of law.

Appellee must overcome the legal presumption that a waiver of lien was not intended. In *Tanksley v. Tanksley* (1932 Wash.) 17 Pac. (2d) 25, the Court said at page 28:

> "* * * the presumption touching the waiver of statutory or other lien rights is always *strongly* against such a waiver having been made." (Italics ours.)

Further cases of a similar nature will be hereinafter cited particularly in connection with the question of waiver subsequent to the appointment of the receiver.

Disregarding for the moment the alleged statements of Hall, appellant had from the start a lien upon the paper deposited for collection. Strictly speaking, this was properly converted into a right of set-off when the drafts were collected. Therefore, any supposed waiver on the part of the appellant would be referable as well to its right of set-off as to its lien.

A. The Authority of Updike v. Oakland Motor Car Co.

In *Updike v. Oakland Motor Car Co.* (1931) 53 Fed. (2) 369, the Oakland Motor Car Co. repurchased the equities in certain automobiles owned by one of its dealers, the latter being then close to financial difficulties. Instead of paying cash as agreed by it, the Oakland Motor Car Co. set off the amount of the repurchase price against the indebtedness of the dealer to it. The trustee in bankruptcy brought action to recover the purchase price on the ground, among others, that the Oakland Motor Car Co. had by agreement waived its right of set-off. This was predicated on the agreement by the Oakland Motor Car Co. to pay for the equities in cash and on the promise of the company to carry the advertising account of the dealer indefinitely. The Court, at page 372, said:

> "The appellants argue that Oakland should have paid for the equities in the cars in cash instead of taking setoffs for all but $50,000. Stratton said the agreement was to pay in cash, and the trial judge evidently believed him. *But Stratton never claimed that Oakland in terms promised not to exercise the right of setoff or that the payment was to be a special deposit in Stratton's favor or was to be applied by Oakland in some specific way.* Stratton did say that Oakland promised to carry the advertising account indefinitely. But such a promise would not in itself prevent a setoff even now. Moreover, if there was a promise to pay cash, that was not an agreement to apply the moneys for a particular purpose or to hold them as a special deposit. It involved no fiduciary relation, but only a promise by Oakland to Stratton. *An agreement must be clear and*

> *specific to deprive a party of the ordinary right of setoff.* Stratton was trying to get $250,000 from Oakland to tide his company through the winter and was hoping against hope for ready cash, but he got no agreement not to set off and the right of setoff existed because the claims were mutual." (Italics ours.)

It is submitted that the agreement to pay cash in the cited case was far stronger as a waiver of set-off than are the alleged instructions of Hall in the case at bar. Here no contention has been made that there was ever any mention by Hall or anyone else of banker's lien or right of set-off, notwithstanding that Hall knew at the time of his conferences with the bank officials of the existence of banker's liens. The conclusion is irresistible that one who was attempting, as Hall claims he was, to effect a waiver of a banker's lien or right of set-off, would have so stated specifically instead of using such ambiguous language as is here contended amounts to an agreement of such waiver.

B. The Strong Analogy of American Surety Company v. Bank of Italy.

The case of *American Surety Company v. Bank of Italy* (1923), 63 Cal. App. 149, previously cited, is completely destructive of the holding of the lower Court that the alleged acquiescence of appellant in the statements of Hall amounted to a waiver of banker's lien. In that case a depositor in the defendant bank had six accounts under the following names: (1) Ernest Green account; (2) Ernest Green, Milliken Bridge account; (3) Ernest Green, Kewin Garage account; (4) Ernest Green, Davis Garage

account; (5) Ernest Green, account of son; (6) Ernest Green Silva Garage account. The depositor was engaged in the building contract business and opened these accounts in this manner so that each one would apply to a separate contract. The defendant bank appropriated the account designated "Ernest Green, Silva Garage", to satisfy an indebtedness due from the depositor to the bank. It was contended and so held by the lower Court that the designation of the account in this manner created a special deposit or trust which prevented the exercise by the defendant of its banker's lien. Assuming that Hall in the case at bar intended by his statements, as appellee argues, to procure a waiver of lien by appellant, and assuming, as was contended and urged in the cited case, that the depositor therein intended the same thing, it is immediately apparent that *American Surety Company v. Bank of Italy,* supra, is similar on its facts to the case at bar and strong authority for appellant's position. It is true that in the cited case there was no express statement that the deposit was to be kept separate and apart from other financial transactions with the bank, but nevertheless, the designation of the account as a separate account was tantamount to such an instruction. The District Court of Appeal, in holding that the defendant bank had a right to exercise its lien upon this deposit, and in reversing the judgment of the lower Court, said, at page 159:

> "A banker is not required to go 'snooping' about to learn from what source his depositors obtained the moneys which they deposit in his bank. His duties as a depositary of moneys are

fulfilled if he keeps and handles the moneys deposited with him according to the requirements of the depositor or the conditions upon which the deposit is made, *and these requirements or conditions, if they impose something beyond his usual or ordinary obligations in the matter of the handling of the deposits of money, must be brought home to him by instructions by the depositor or an agreement between him and the depositor so clear or so unambiguous and unequivocal as to leave no room for a reasonable doubt as to their meaning and scope.* A depositor may establish an account in a bank under a special designation or earmarked as a particular account, and yet, in the absence of an agreement with or instructions to the banker that the account so earmarked is a special deposit or is to be used for a specific purpose, the moneys deposited therein are to be regarded as belonging to the general account of the depositor and may be so treated by the bank. * * * The 'earmarking' of a bank deposit or giving to it a special or particular designation, even when the bank has, by the request of the depositor, entered in its deposit books the deposit as so earmarked or designated, *can mean nothing, so far as the bank is concerned, in the absence of specific instructions to the bank by the depositor that the deposit is to be used for the special purpose indicated by the 'earmark' or designation.* So far as the record here shows to the contrary, Ernest Green might have caused the several accounts opened by him in the defendant bank and given each a special and different earmark for his own convenience. Such a practice, as we know from common knowledge, is quite general among business men, particularly those engaged

in the wholesale trade. For their own convenience they keep a separate account of the different commodities in which they deal. Thus they are the more readily able to learn whether there be profit or loss in the sale of any particular commodity. And so, probably, with building contractors having a number of different contracts for the construction of buildings concurrently in the course of execution. But the outstanding fact in this case is, as above explained, that there is no evidence in this record showing that there was any understanding between the bank and Green or any direction by the latter to the bank that the account in controversy was opened and the money therein deposited would be appropriated to a special purpose, and it follows that the said account, unless for other reasons it involves a trust fund, *constitutes a general deposit of said Green, even though the defendant knew or had reason to believe that the funds so deposited were to be devoted to the payment of the claims of materialmen, mechanics and laborers furnishing material for and performing labor on the Silva Garage.*" (Italics ours.)

Although the case last cited deals specifically with the deposit of money, there is no reason why the rule thereof should not be equally applicable to deposits of commercial paper. In fact, California Civil Code, Section 3054, expressly provides that a banker has a lien "upon *all property* in his hands".

The rule of law being, as stated in *American Surety Company v. Bank of Italy* and *Updike v. Oakland Motor Car Company,* that the conditions and requirements under which a deposit is made must be brought

home to the banker by instructions or by an agreement between the banker and the depositor "so clear, or so unambiguous and unequivocal as to leave no room for reasonable doubt as to their meaning and scope" where such conditions and requirements import something beyond the usual or ordinary obligations of a banker in handling deposits, it is submitted that appellee's case in this respect, resting as it does upon the aforesaid alleged assertions of Mr. Hall, completely falls. The only convincing thing about these assertions is that they were ambiguous, uncertain and equivocal as to any purported waiver of appellant's lien. Mention has heretofore been made of the other purposes to which these statements were just as referable as they were to a waiver of banker's lien. Under the holdings of the last two cited cases, if the language relied upon as constituting a waiver of set-off or banker's lien is capable of meanings other than that so claimed, the ordinary rights and duties of the bank remain unchanged.

C. No Special Deposit was Created.

The Court below held in Conclusion No. V of its Conclusions of Law (R. 195) that the alleged instructions of Hall caused the drafts in question to be deposited specially as a trust fund, and consequently were immune from the operation of the law of banker's liens. This theory, as well as the theory of waiver of lien, is considered in *American Surety Co. v. Bank of Italy,* supra, where it was likewise claimed that a special deposit had been created. But the Court held that because of the ambiguity of the

instructions relied upon, no special deposit or trust was ever created.

If the words alleged to have been used by Hall had the effect of creating a special deposit, it is pertinent to ask for what purpose was it created? The answer is (without considering any question of banker's lien) that the proceeds were to be turned over to Richfield Oil Company the same as they would have been if, as appellant contends, the deposit was general. There was consequently no special purpose involved in the deposit of the drafts.

A special deposit may be created by the deposit of funds in the custody of a banker with the direction that they be kept separate from other funds of the bank and the identical money returned to the depositor, or a special deposit may be created where the funds are not to be kept separate from the other moneys of the bank but the deposit is to be used only for a special purpose. These two types of special deposits differ particularly in the circumstances under which the legal effect thereof is considered but the reasoning of the Courts with respect to the creation of either type is equally applicable to both.

In *Butcher v. Butler* (1908, Mo.), 114 S. W. 564, one party to a contract deposited money in the defendant bank for the purpose of having it paid to the second party to the contract. The bank made out a deposit slip containing the following language: "trust fund by P. T. Becker * * * checks as follows: $1000.00 to be paid to Butcher when he shall have put his drill down 1000 feet. $1000.00." The question

was whether these facts were sufficient to create a trust fund or special deposit in the sense that the moneys deposited were to be kept separate from the other funds of the bank giving the depositor a preference over the assignee for the benefit of creditors. In holding that no such trust or special deposit had been created, the Court said, at page 566:

> "In the absence of proof to the contrary, a deposit is presumed to be general, and it devolves on the party who claims it is not *to show that it was received by the bank with the agreement, expressed or clearly implied, that it should be kept separate from the other funds of the bank, and the identical money returned to the depositor.* The deposit under consideration, we think, was general, not special. *There was no intention or thought entertained by Becker, Butcher or the bank that the funds deposited were to be kept separate and the bank deprived of their use.*" (Italics ours.)

In *Minard v. Watts* (1910), 186 Fed. 245, funds were deposited in a bank during the pendency of litigation to abide the final decision of a controversy over the title to land. The question again was whether the depositor was entitled to a preference in bankruptcy. It was agreed by the parties that there was not at any time any expressed agreement or understanding that the deposits were to be held or kept separate from the general funds of the bank. The Court said, at page 247:

> "It is the business of a bank, and one of the purposes for which it was created, to receive the money of its depositors on the implied agreement

to return a like amount on demand or in a stipulated length of time, with or without interest, as the case may be, and to loan such money to its customers, receiving compensation by way of interest charged. Banks are not created for the purpose of acting as bailees of the property of others, either with or without hire. While a national bank by contract may possibly bind itself to such legal relation, *it is quite clear this may be done only either by express contract, or the transaction of deposit must, from its very nature be of such character as to imply such obligation and relation.* Mr. Morse, in his work on Banks and Banking (2d ed., p. 69), says:

> 'Ordinarily, a deposit of money, at least if it be the current money of the country or state where the deposit is made, will be assumed to be a general deposit, unless the contrary is at the time directly notified, or in some shape distinctly implied, *so that the bank could not reasonably misunderstand the depositor's intent.*' "

In *Clay County Bank v. First National Bank* (1929, Ark.), 13 S. W. (2) 595, the question was whether the presentation by a depositor of a list of outstanding checks which were to be paid from his deposit was sufficient to create a special deposit precluding the bank from exercising its right of setoff or banker's lien. The Court held that this was not sufficient to create a special deposit and the bank was entitled to its lien or right of setoff upon the funds in question.

There is no evidence in the record of the case at bar of a single word or act on the part of any officer or employee of appellant which indicates an intention to

waive the lien. Appellee's case is founded solely on the statements of Hall. From the record, no response to these statements was made. This absence of anything said or done on the part of appellant conclusively prevents the existence of a waiver.

In *Bray v. Booker* (1899, N. D.), 79 N. W. 293, the Court, in holding there had been no waiver of a vendor's lien, reasoned as follows, at page 297:

> "Of course, the lien may be waived by any act or declaration of the vendor clearly evincing a manifest intention so to do. But the circumstances must certainly be exceptional if a waiver can ever be inferred from his silence, and that is all we have in this case, except the fact that the vendor executed the deed after Mr. Booker had expressly refused to give a mortgage on the property, and after he had stated that he desired to turn the property over to Mrs. Booker free from all incumbrances. *But these were simply declarations of the vendee, to which some affirmative response must have been made by the vendor before any of his rights can be concluded thereby.*" (Italics ours.)

It is submitted that none of the cases cited leave any room for doubt that a banker's lien is not waived or a special deposit created unless *specific* and *express* language to this effect is used, or the existence of such lien or special deposit may be *distinctly* and *unambiguously* implied. Again appellant submits that the assertions of Mr. Hall do not measure up to the legal requirements necessary to support the conclusion of the lower Court.

(1) In Order to Constitute the Deposit of the Drafts as a "Special Deposit" Both Appellant and Richfield Must Have Understood the Deposit to be for a Special Purpose Only.

In *In re North Missouri Trust Co.* (1931, Mo.), 39 S. W. (2) 412, plaintiff deposited funds in an insolvent bank with the direction that they were to be used to buy bonds for him. Plaintiff claimed that because of this instruction he was entitled to a preference over the other creditors. The Court held that no special deposit had been made and, at page 414, said:

> "Beyond this, they hold (cases cited) that in determining whether a deposit is general or special not only is the purpose for which the deposit is made and received to be considered, but also the mutual intention of the parties when the deposit is made; that, in other words, whether the deposit is general or special is to be determined from the bona fide contract of the parties; *that in order to constitute a special deposit, the facts and circumstances must show that the bank and the depositor both understood that the fund was to be held for a special purpose and that the bank should not pay checks drawn against it for any other purposes;* * * *" (Italics ours.)

In *Ellington v. Cantley* (Mo. 1927), 300 S. W. 529, money was deposited in a bank with a statement by the depositors that they wanted to pay therefrom the interest on their real estate loan with an insurance company. The action was to determine whether as a result of these statements they were entitled to a preference over other creditors or whether the bank could properly exercise its banker's lien against the deposit on account of the past due indebtedness of the

depositors. The Court, in denying the claim to preference and upholding the bank's lien right, said at page 531:

> "In order to constitute the $840 a special deposit, the facts and circumstances would have to show that the bank and plaintiffs both understood that the $840 was to be held for the special purpose of paying plaintiffs' interest, and that the bank should not pay checks drawn against it for any other purpose."

In *Craig v. Bank of Granby* (1922, Mo.), 238 S. W. 507, the manager of a mining company told the Cashier of the defendant bank that he would later deposit money in the bank to meet the payroll of the mining company. The trustee in bankruptcy of the mining company brought an action against the bank, claiming that the conversation of the manager with the cashier of the bank created a special deposit against which the bank had no right to exercise a banker's lien. The Court upheld the bank's right of offset, reiterated the rule that the burden of showing the account as "special" rests on the person so claiming, and said at page 509:

> "In order to have made this a special deposit for the purpose of paying the payroll checks, both the depositor and the bank must have understood that this money was to be held for that purpose, and that no other checks were to be paid from it * * *."

There is nothing in the record which indicates that appellant understood that a special deposit of the Richfield foreign drafts was intended nor is there any

evidence of circumstances by reason of which appellant should have known this. Certainly the bare language of Hall that the foreign department transactions were separate was not sufficient even to put appellant on inquiry. It is far less strong than the language, written and oral, in the cases previously cited and which was held insufficient to defeat the bank's lien.

Appellee contended in the Court below that the deposit by appellant of the proceeds of some of the drafts not involved in this action to the account of appellee as receiver of Richfield Oil Company without exercising its right of setoff, displayed an understanding on the part of appellant that a waiver of lien was intended by Hall. That appellant did not so understand these statements is conclusively shown by the telegram sent by appellant to appellee as receiver of Richfield Oil Company on January 16, 1931 (R. 210), in response to the receiver's telegram of the same date. (R. 209.) The following quotation therefrom is pertinent in this respect:

> "We are holding certain collections as security for acceptances. Please understand that we continue to reserve all our rights for banker's lien against these collections."

The argument that the act of depositing the proceeds of some of the drafts to the credit of the receiver indicated an understanding on the part of appellant that a waiver of lien had been agreed to or was even intended, will be hereinafter further considered in connection with the question as to whether the lien or right of setoff was waived subsequent to the appointment of appellee as receiver.

(2) Legal Effect of Hall's Instructions When Subjected to the Analogy of the Cases on Waiver of Mechanics' Liens.

The authorities involving waiver of mechanics' liens assert the principles which, it is submitted, are controlling on the question involved in the instant matter. In all these cases the alleged waiver agreements were entered into at the outset of the arrangements for construction, just as the statements by Hall are alleged here to have been made early in his negotiations with appellant.

In *Gray v. Hickey* (1917, Wash.), 162 Pac. 564, the Court said, at page 566:

> "We do not construe this provision of the contract as a waiver of Gray's lien right for the work to be performed by him. It in any event is not a clear waiver of such right. The rule seems to be that, when the terms of the contract are ambiguous in this respect, they should be construed most favorably to the person claiming the lien right."

In *Carl Miller Lumber Co. v. Meyer* (1924, Wis.), 196 N. W. 840, the Court, in holding that an agreement was insufficient to effect a waiver of a materialman's lien, said, at page 842:

> "There is no doubt that the plaintiff could have waived the right to file a lien by express agreement, although when an agreement relied on as a waiver is ambiguous the doubt should be resolved against the waiver."

In *Kokomo F. & W. Traction Co. v. Kokomo Trust Co.* (1923, Ind.), 137 N. E. 763, the Court said at page 765:

> "All of these cases recognize the rule of law that a builder may waive the right of himself and those claiming under him to the lien given by statute * * * *But they hold that, in the absence of evidence contained in the contract that it was clearly the intention to make such a waiver, it must be presumed that the builder has not disabled himself from enforcing a lien, and that where the terms of the contract are ambiguous on the question, the doubt must be solved against such a waiver.*"

In *Central Illinois Construction Co. v. Brown Construction Co.* (1907), 137 Ill. App. 532, a provision in a building contract provided that

> "the completed work when offered to the company for acceptance shall be delivered free from any and all liens, claims or encumbrances of any description."

The Court in holding that this did not amount to a waiver of the contractor's lien, said, at page 535:

> "Where the provisions of the contract relied upon as constituting a waiver of the statutory right to assert and enforce a lien are ambiguous, the doubt should be resolved against the waiver."

In *Davis v. La Crosse Hospital Assn.* (1904, Wis.), 99 N. W. 351, a building contract provided that the completed building should be delivered to the owner free from all claims, liens and charges. In holding that the builder had not waived the right to exercise his lien, the Court said, at page 352:

> "A builder may waive his right to the lien remedy given by statute and does so by agreeing

> not to exercise such right * * * *But where the terms of a contract are ambiguous on the question, the doubt should be resolved against the waiver, since it should be presumed, in the absence of clear evidence to the contrary, that one has not disabled himself from the use of so valuable a privilege as that given by statute for the enforcement of a builder's rights in the circumstances involved in such a case as this.*" (Italics ours.)

The language in the case last cited is significant; it is submitted that in the case at bar it must be presumed in accordance with the recognized principles applicable to special accounts and waiver of rights that appellant did not disable itself from the use of so valuable a privilege as that given by the statute for the enforcement of a banker's lien against the drafts in question and the proceeds thereof.

The following quotations from *Selna v. Selna* (1899), 125 Cal. 357, 362, a case involving the waiver of a vendor's lien, is in point:

> "The burden of proof is on the purchaser to establish that in the particular case the lien has been intentionally displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches. And so long as the debt exists courts will not presume that the lien has been waived, except upon clear and convincing testimony."

It is at least doubtful, although appellant does not concede even this, whether the lien was waived, and under the foregoing case and others cited the presence of such doubt precludes a holding of waiver.

Further authorities relating to the waiver of liens will be hereinafter cited with reference to the question as to whether appellant waived its banker's lien subsequent to the appointment of appellee as receiver. These cases are equally applicable here in determining the legal effect, if any, to which the alleged instructions of Hall are entitled.

(3) In Event of Uncertainty, the Language of a Contract Should be Interpreted Most Strongly Against the Party Who Caused the Uncertainty to Exist.

The uncertainty or ambiguity which appears in the language used by Mr. Hall was certainly caused by Hall himself. Therefore, such ambiguity should be interpreted most strongly against appellee who relies upon such language. Section 1653 of the Civil Code of the State of California provides:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promissor is presumed to be such party."

In *Sternberg v. Drainage District,* 44 Fed. (2) 560, at page 562, the following appears:

> "If the contract is ambiguous, the plaintiff is responsible for its ambiguity and under such circumstance, the contract should be construed most strongly against the party preparing it."

In *Continental Oil Co. v. Fisher,* 55 Fed. (2) 14, at page 16, it is said:

> "It may be true the intention of Continental Oil Company was to contract for this privilege

> of reassignment. Their tenders indicated they had that theory of the 'modification agreement'. But why was the option not mentioned? A capable lawyer for the company drew the contract, and even if we assume the instrument to be ambiguous in this respect, the rule applies that the doubt be resolved against the party who drew it."

The issue involved in the last cited case was whether an agreement between the parties could be construed to include an option of reassignment. The question asked by the Court in the quotation hereinabove set forth is particularly pertinent, for appellant may reasonably inquire, as it has throughout this brief, why, if Mr. Hall intended to secure a waiver of a banker's line, did he not mention this specifically? It is submitted that since Hall, Richfield's representative, used the language relied upon and since it is ambiguous, it must be construed most strongly against appellee. The application of this principle is an added bar to any interpretation that appellant waived its banker's lien or right of setoff.

(4) Examination of Authorities Relied Upon by the Trial Court.

In his opinion, Judge Norcross cited the following cases as authority for his conclusion that a special deposit was created by the alleged instructions of Hall to appellant:

> *Raynes v. Du Mont* (1889), 130 U. S. 354;
> *Union Bank & Trust Co. v. Loble* (1927), 20 Fed. (2) 124;
> (R. 179.)

These cases and others upon which appellee relied in the Court below quite properly hold that a special deposit or a deposit in trust operates to destroy the right of a bank to exercise its lien. In all of these authorities, however, the facts were such that there could be no doubt about the existence of a special deposit. The question as to the existence of a trust or special deposit or of a transaction removed from the ordinary course of business is naturally dependent for its answer upon the facts.

In *Raynes v. Du Mont,* supra, one bank deposited collateral in a second bank for the express purpose of securing the indebtedness of a third bank. The depositary, after satisfying the indebtedness of the third bank from these securities, attempted to exercise a banker's lien on the surplus as an offset to the indebtedness to it of the depositing bank. The Court correctly held that this was a deposit for a special purpose and therefore not subject to banker's lien.

In *Union Bank & Trust Co. v. Loble,* supra, money was deposited in the defendant bank for the express purpose of paying certain creditors of the depositor. Here again it was held that the deposit was one for a special purpose and not subject to banker's lien.

It is obvious that there is a great difference between the foregoing facts and those in the case at bar. There could be no question in these cases that the deposits were for special purposes. In all of the authorities relied upon by appellee at the trial, the facts were substantially similar to those of the two cases last noted.

The Court further cited:

Buckner v. Leon & Co. (1928), 204 Cal. 225, 267 Pac. 693;

Campbell v. Miller (1928), 205 Cal. 22, 269 Pac. 536;

Blahnik v. Small Farms Imp. Co. (1919), 181 Cal. 379, 184 Pac. 661;

Savings Bank v. Ashbury (1897), 117 Cal. 96, 48 Pac. 1081;

Smith v. Smith (1918), 200 S. W. 445;

(R. 179.)

These cases merely hold that where a contract is on its face incomplete, extrinsic evidence of contemporaneous parol agreements may be introduced. They were cited by the Court in support of its conclusion that since the acceptance agreement is blank as to the drafts deposited thereunder, parol evidence was admissible to prove which drafts were and which were not so deposited. There can be no question about the correctness of this ruling. However, as hereinbefore argued, if it be found that the drafts were deposited under the acceptance agreement, then as stated in Subdivision (c) of the Eighth Assignment of Error (R. 482, 483), the Court below erred in admitting evidence as to the aforesaid instructions of Hall to the bank, for such instructions, if they were to be construed as effecting a waiver of lien, were in direct conflict with the provisions of the acceptance agreement that all drafts deposited thereunder would be security for all other indebtedness

from Richfield Oil Company to appellant. See *Davis v. Stanislaus Co. Farmers Union* (1925), 72 Cal. App. 698, 238 Pac. 95; and 10 *California Jurisprudence* 927, to the effect that even though a written agreement may be blank in certain respects, parol evidence in conflict with its *express* terms is inadmissible.

(5) The Burden of Proving That the Deposit of Drafts Was Special Rests Upon Appellee.

Not only does the burden of proving that the deposit of the drafts was special rest upon appellee, but he is likewise faced with the rule that all deposits are presumed to be general unless proven otherwise by clear and convincing evidence.

In *In re North Missouri Trust Co.* (1931, Mo.), 39 S. W. (2) 412, the following appears:

> "Under the rule of these authorities, the presumption is that a deposit is general, and the burden of proving otherwise is on the person claiming priority as a special depositor."

In *Craig v. Bank of Granby* (1922, Mo.), 238 S. W. 507, at 509, the Court holds:

> "In the absence of proof to the contrary, all deposits are presumed to be general deposits, and the burden was upon plaintiff in this case to show that the deposit of $1000.00 was made by it to meet the payroll checks that had been previously issued, and that this money or its equivalent was to be applied to the payment of these checks, *and that the bank so understood it at the time.*" (Italics ours.)

To the same effect see *Butcher v. Butler* (1908, Mo.), 114 S. W. 564; *State v. Farmers & Merchants Bank* (1926, Neb.), 207 N. W. 666.

Appellant submits that the Finding of the lower Court that appellant waived its banker's lien on the drafts in question at the inception of the foreign draft transactions, if allowed to stand, will place a premium on uncertainty in banking transactions; it will be a source of confusion in the future, and will do violence to the sound and wholesome policy of the law in favor of upholding banker's liens. If such a doctrine as that for which appellee here contends should prevail, banker's liens, as stated by an early Missouri Court, "would soon become plants of delicate and exotic growth". (*Major v. Buckley* (1873), 51 Mo. 227, 232.)

In view of the ambiguity of the language upon which appellee relies to show that appellant waived its banker's lien; in view of the rule as set forth in Bank of Italy v. American Surety Company, supra, Updike v. Oakland Motor Car, supra, and similar cases, that an agreement waiving setoff must be specific in terms; in view of the rule of presumption respecting waiver of liens; in view of the presumption against special accounts; and in view of the rule that the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, it is submitted that the statements of Hall relied on by appellee, even if they be given their strongest aspect, are insufficient to constitute an agreement by which appellant waived its banker's lien and right of setoff.

V.

APPELLANT DID NOT WAIVE EITHER ITS CONTRACTUAL RIGHT OR ITS BANKER'S LIEN OR RIGHT OF SETOFF BY ANY AGREEMENT, REPRESENTATION OR ACTION SUBSEQUENT TO THE APPOINTMENT OF THE RECEIVER, NOR IS APPELLANT ESTOPPED FROM ASSERTING SUCH RIGHT OR LIEN.

The lower Court found (Findings No. XIX, XX and XXI) (R. 190, 191, 192) that, by reason of the wording of a telegram sent by appellant to appellee in response to a telegram from the latter, and by reason of the events which occurred subsequent to this exchange of telegrams, appellant waived its banker's lien or right of setoff on the drafts involved in this litigation. The telegram sent by appellee to appellant is as follows:

> "As Receiver I am ordered by Federal Court to take over all assets including cash in banks Stop While you have undoubted right of offset, such right if exercised will seriously cripple receiver's operations. It is necessary therefore to request that all banks restore to receiver such *cash balance.* Please therefore transfer *such funds* to a new account on your books in my name as Receiver. Evidence of my authority and signature cards will follow by mail Stop Local banks have indicated they will acquiesce in this program.
>
> William C. McDuffie,
>
> Receiver for Richfield Oil Co. of California."
>
> (Italics ours.)
>
> (R. 209.)

Appellant's reply, which the Court construed as waiving its banker's lien, is as follows:

"Replying telegram we are willing to restore into your name as Receiver Richfields *balance in checking account* provided we are notified by you that all Company's banks have taken similar action Stop We are holding certain collections as security for acceptances please understand that we continue to reserve all our rights for banker's lien against these collections.

Julian Eisenbach,
Vice President Wells Fargo
Bank & Union Trust Co."

(Italics ours.)
(R. 210.)

Both telegrams were sent on January 16, 1931, several months prior to the receipt by appellant of the proceeds of the drafts which are the subject-matter of this litigation.

The argument of appellee, which the Court below apparently accepted, was that in the last sentence of its telegram, appellant, by the use of the word "certain", referred only to those collections which, according to the contention of appellee and the Finding of the Court below, were deposited under the acceptance agreement; that appellant reserved its banker's lien solely against these collections, and then only to the extent necessary to liquidate the outstanding acceptances, concluding that since nothing was said about drafts which, according to appellee's contention were not deposited under the acceptance agreement, appellant must have intended to waive its lien as to these drafts. In addition to the strained and unnatural construction thus given to appellant's tele-

gram, appellee's argument rests upon the false assumption that the bank recognized that some drafts were under the acceptance agreement and others not. Irrespective of the sincerity of Richfield's or appellee's belief in this distinction the evidence is overwhelming that the bank never acknowledged any such difference. Hence the premise, upon which appellee's conclusion is based, is contrary to fact.

(a) Normally and Properly Construed, Appellant's Telegram and Subsequent Conduct Permit no Inference of Waiver of Lien on the Richfield Foreign Drafts.

(1) Appellant's Telegram Waived Banker's Lien or Right of Offset Only Upon Cash Balances Which Existed at That Time.

On January 15, 1931, appellee wrote to appellant, informing the Bank of his appointment as the Receiver of Richfield Oil Company of California, stating his desire to open an account with the Bank in the name of the Receiver, and concluding his letter (R. 203, 204) as follows:

> "In opening the account of Richfield Oil Company of California, William C. McDuffie, receiver, please transfer the balance appearing to the credit of the Richfield Oil Company of California at the close of business January 14, 1931, to the credit of the account 'Richfield Oil Company of California, William C. McDuffie, receiver' * * *" (Italics ours.)

In the meantime several of the company's banking creditors, including appellant, had appropriated outstanding balance in satisfaction of its indebtedness to them.

Thereafter, on the 16th day of January, 1931, a group of bankers representing most of the banking creditors, met with Mr. McDuffie (See Mr. McDuffie's testimony) who requested their cooperation and informed them that it was essential to the receivership that he have available, funds to carry on the business. He urged those bankers who had already exercised their banker's lien against Richfield's funds to restore the balances and asked the others who had not yet exercised their rights to refrain from doing so. (R. 206, 207, 208, 209.) Appellant objected to the testimony as to what transpired at this meeting upon the ground that no representative of the defendant bank was present. (R. 207.) To meet this objection, counsel for appellee attempted to prove through the testimony of the witness Edward J. Nolan that what transpired at the meeting was told to Mr. Julian Eisenbach, one of the vice-presidents of appellant bank, in a telephone conversation of January 16th. The argument with respect to the admissibility of this testimony will hereinafter be stated. Even if relevant and proper, the testimony of what took place at the meeting is not actually of importance because the exchange of telegrams between the parties must necessarily exclusively embody appellee's right, if any. As a result of this meeting, the two telegrams of January 16th hereinbefore set forth, were exchanged.

Mr. Nolan's testimony as to how much of what occurred at the meeting was conveyed to Mr. Eisenbach is not clear. In response to a question propounded upon direct examination, he stated:

> "I recall explaining to Mr. Eisenbach that unless all of the banks were unanimous in returning the *balances* that it looked to me as if the Company would have to go into bankruptcy; that Mr. McDuffie had stated to us that he would have to have certain funds to take care of public utility charges, labor charges and freight rates; that is about all I told him." (R. 243.)

Nothing was mentioned in the telephone conversation with respect to the future course of business of the receivership. (R. 243.) Mr. McDuffie had said nothing about the draft collections with Wells Fargo Bank & Union Trust Co., and Mr. Nolan said nothing about them in his conversation with Mr. Eisenbach. The whole purpose of the telephone conversation was as Mr. Nolan said:

> "* * * to explain the dire condition of the receivership; that if the *balances* were not restored or if the banker's liens were to be exercised by the different banks that it would be necessary for the Company to go into bankruptcy." (Italics ours.) (R. 246.)

Mr. Nolan further testified that in conjunction with Mr. McDuffie, Mr. Hardacre and the other bankers present ("it being the work of about twelve of us" (R. 245)), the Receiver's telegram of January 16th was prepared for transmission to each of the banking creditors. What the agreement, if any, between the bankers was supposed to be, is expressed by Mr. Nolan in response to a question on cross-examination as follows:

> "The whole question of agreement between the banks was to restore the *cash balances* and such

items as were in transit. For instance, in our institution there were many items in transit from the branch banks."

(R. 244.)

While Mr. McDuffie and his counsel urge that the supposed agreement was intended to apply to future credits, such was not Mr. Nolan's testimony, nor does the carefully prepared telegram to appellant and to the other banks mention or refer to banker's lien in any connection except with respect to cash balances.

This telegram, it must be remembered, was the second communication from appellees to the appellant bank; the first was the letter of January 15, 1931 (R. 203, 204), the major part of which has been hereinbefore quoted. The request in the receiver's telegram of the 16th and his letter of the 15th, was to restore the cash balance, notwithstanding "the undoubted right of offset". Appellee urged at the trial that the first part of the telegram from the receiver advising the bank that he was ordered by the Federal Court to take over all assets, including cash in banks, indicates somehow that his telegram was intended to apply to drafts and other items in the process of collection, as well as to cash balances. Had the receiver, a man of experience in the business world, intended this, he most certainly would have so stated in his telegram, and if he himself had failed to do so it is logical to assume that at least one or more of the twelve bankers who participated in the preparation of the telegram would have suggested, if such had been their intention, a request to the banks to refrain from any action directed against future collections. This request, it

can properly be inferred, was not intended, or was overlooked. In support of this conclusion, it is uncontradicted that the matter of the collection of foreign drafts was not mentioned by the receiver at his conference with the bankers. (R. 248.)

Instead of appellee's strained interpretation of the opening few words of the receiver's telegram of January 16th, it is submitted that the logical interpretation, and the one understood not alone by the appellant bank but by all of the other banks to which the telegram was sent is that, as receiver, Mr. McDuffie was requesting a restoration of *cash balances* then outstanding. Appellant's reply telegram announced nothing more than a compliance with this request. Its interpretation evidenced willingness to restore "the balance in checking account" and was apparently the same as that of all the other banks to which the telegram was sent. The Chemical Bank and Trust Co. telegraphed that it would "Restore Richfield's balance" (R. 212); the two Chicago banks wired that they would "Replace balances" (R. 212); the First Seattle Dexter-Horton National Bank telegraphed that it would "Release funds that were on deposit" (R. 213); the American Trust Company of San Francisco announced its willingness to transfer "balances" (R. 214); The Los Angeles Main Office of the Bank of America (Mr. Nolan's bank) sent a telegram stating that the "balance had been transferred" (R. 214); the Security First National Bank of Los Angeles wired that it had credited "$37,906.06 *balance* remaining in Richfield Oil Company account" (R. 214, 215), and followed this by a letter that the bank was

willing to transfer to the receiver *"balances"* to the credit of Richfield Oil Company (R. 215); The California Bank, Los Angeles, merely wired that it had acceded to the receiver's request. (R. 216, 217.)

The correspondence between the parties subsequent to the exchange of telegrams on January 16, 1931, evidences further their mutual intention to deal only with the Richfield cash balances then existing. Appellant confirmed its telegram of January 16th by a letter dated January 17th (R. 219, 220) wherein the telegram was incorporated in haec verba and which stated that:

> "* * * pending notification by you that all of the company's banks have restored to the receiver cash balances, we have taken no action towards *such* restoration on our part."
>
> (R. 220.)

On January 22, 1931, appellee telegraphed to appellant as follows:

> "All banks have now expressed their willingness to replace Richfield Oil Company's *offset balances* of January 15th to the credit of receiver (stop) Will therefore greatly appreciate your at once transferring such sums to my credit, advising me the amount by wire collect (stop) Wish express appreciation your cooperation as *these* funds will be of great assistance."
>
> (R. 220, 221.)

In reply to this telegram, appellant wired the receiver on January 22, 1931, as follows:

> "Answering wire have to-day placed to your credit Richfield Oil Company's *offset balance* of

January 15th, amount $40,874.77." (Italics ours in the foregoing quotation.)

(R. 221.)

This correspondence leaves no doubt about the nature of its subject. Mr. McDuffie intended only to procure a release of the funds then standing to the credit of Richfield Oil Company and he was satisfied with appellant's cooperation to this extent. His own testimony supports this, for on the witness stand he said:

"By the use of the words, 'all banks have now expressed their willingness to replace Richfield Oil Company's offset balances of January 15th, to credit of receiver', I meant the balances of January 15th. I did not refer to the collections in foreign countries that were not payable for many days thereafter."

(R. 277.)

Lest it be urged that appellant has not conducted itself equitably in its cooperation with the Receiver it should be noted that on January 22, 1931, as stated in its telegram of that date, appellant restored the sum of $40,874.77 to the credit of appellee. This cooperation, which will subsequently be more fully discussed herein, was continued by appellee until the early part of May, 1931. On March 5, 1931, the sum of $7749.58 was paid to appellee and between March 5, 1931, and April 22, 1931, the sum of $26,464.13, making a total amount paid to the receiver from the date of his appointment to the date of the institution of this action, of $75.088.48. If equities be projected into this

case, these voluntary restorations should be kept in mind.

Appellee would not have this Court believe that he intended to admit in his telegram of January 16, 1931, that appellant at that time was vested with a banker's lien upon the drafts in question, or, in other words, that there had been no waiver of lien by appellant in August and October, 1930, as hereinbefore discussed. Yet insistance by appellee upon his stand that by the wording of his telegram he was requesting a waiver of lien as to all foreign drafts as well as the cash balances places him in this position. For in his telegram, the following appears:

> "While you have undoubted right of offset * * *"

This statement without question was made with the $625,000.00 indebtedness of Richfield Oil Company to appellant in mind, and if the telegram is to be construed as applying to the foreign draft collections as well as the cash balances, it carries with it an admission that up to that time, at least, appellant had not waived its lien on the drafts. If appellee does not wish such a construction of his telegram, he is necessarily relegated to that which appellant contends is the only proper one, to-wit: that the parties were dealing only with the then existing cash balances. Again appellee's case must be impaled on either horn of a dilemma.

(2) Appellant by Its Telegram of January 16, 1931, Reserved Its Banker's Lien Upon All Foreign Drafts Then in Its Possession and the Proceeds Thereof.

> "We are holding certain collections as security for acceptances. Please understand that we con-

tinue to reserve all our rights for banker's lien against these collections."
(R. 210.)

This simple sentence from appellant's telegram precipitated an extensive argument by appellee's counsel at the trial to distort this express *reservation* of banker's lien on all Richfield's drafts held by appellant into a *waiver* of lien on the drafts here in dispute.

Appellee's theories upon which he founded his conclusion of waiver, and which he succeeded in impressing upon the Court below, have heretofore been summarized and need not now be repeated. Appellant cannot however refrain from again adverting to the artificiality of Appellee's position throughout this case and which now leads him to the ingenious but unconvincing conclusion that appellant bank reserved a lien only upon the drafts admittedly under the acceptances, and then only to the extent that their proceeds would be essential to liquidate such acceptances.

On appellee's theory that only part of the drafts were deposited under the acceptances, or on appellant's theory that all of them were, this interpretation of the telegram renders meaningless the words, "We continue to reserve all our rights for banker's lien against these collections". When informing the receiver that it was holding certain collections as *security* for acceptances, which it had an unquestioned right to do, there was no necessity for appellant further to inform the receiver that it continued to reserve its banker's lien against these collections, unless it intended to refer to the excess proceeds over and above the amount neces-

sary to liquidate the acceptances. It is submitted that the natural construction of this telegram, whether it was applicable, as appellee claims, only to the drafts admittedly under the acceptances, or to all of the drafts, is that a banker's lien for the general indebtedness of Richfield to appellant was reserved upon all proceeds of such drafts over and above the amount necessary to liquidate the acceptances outstanding.

Although the briefs submitted upon the conclusion of the trial are not before this Court, appellee will not deny that in his opening brief in the lower Court, he admitted that draft No. 103,012, drawn on Bueno y Cia, was deposited under the acceptance agreement, and that the excess proceeds thereof, in the sum of $469.06, were consequently properly appropriated by appellant to the satisfaction of Richfield Oil Company's note indebtedness, in accordance with the terms of the acceptance agreement. Also, appellee will not deny that Finding No. XV (R. 188, 189) was proposed by him and accepted by the Court without objection from appellant. This Finding embodies appellee's admission that draft No. 103,012 was deposited under the acceptance agreement and the proceeds thereof were therefore properly appropriated by appellant to the satisfaction of the general indebtedness of Richfield.

By appellee's own admission, then, his theory that appellant in its telegram of January 16, 1931, reserved a lien upon the drafts to which said telegram was applicable *only to the extent of the amount necessary to liquidate the acceptances,* is unsound. For, if his theory were correct, appellant had no right to the proceeds of draft No. 103,012. In passing, it will be

remembered that draft No. 103,012 was the one referred to at the beginning of this brief as having been included in appellee's complaint, but with respect to which appellee waived all rights at the trial on the ground that it was deposited under the acceptance agreement and consequently its proceeds were subject to application by appellant on account of Richfield's general indebtedness.

For the same reason the findings of the Court are inconsistent in this respect. Finding No. XIX (R. 190, 191) is an attempt to embody appellee's theory. Yet in Finding XV (R. 188, 189), as hereinabove pointed out, the Court found that the excess proceeds of draft No. 103,012, admittedly deposited under the acceptance agreement, were properly appropriated by appellant to the Richfield note indebtedness.

Having demonstrated, then, as appellant believes it has, that whatever the drafts were to which the reservation in appellant's telegram of January 16th was applicable, this reservation was not limited to the amount of the proceeds of the drafts necessary to liquidate the acceptances, but also extended to the excess of such proceeds, it is now necessary to ascertain to just what drafts this reservation applied. Appellant's position is that this reservation was intended to and did apply to all Richfield drafts which it then held.

Appellee seized upon the word, "certain", in appellant's telegram, arguing that its use was proof that appellant only intended to reserve a lien upon the drafts which were admittedly deposited under the acceptance agreement, and that by failing to mention

those which appellee claims were not under agreement, appellant waived its lien thereon. The word, "certain", appellee argued, citing Webster's Dictionary, means "some among others". Appellee thereupon conveniently concluded that the "some" were the drafts admittedly under the acceptance agreement, and the "others" were the drafts here in dispute.

Assuming that appellee is correct in his definition of the word, "certain", the fundamental difficulty with his argument, from the standpoint of construction, is that there is nothing in the telegram which shows what the "certain" drafts were to which appellant referred. Appellee has gratuitously assumed that they were not the drafts involved herein. However, for all that can be gathered from the evidence appellant might just as well have been referring to the drafts here in dispute as to any others. Appellee's conclusion is pure speculation. Furthermore, on appellee's interpretation the telegram might fairly be construed as meaning "We are holding *your* collections among the many we have as security for acceptances".

But appellant was obviously referring in its telegram to all of the drafts which it then held for Richfield Oil Company. It is common knowledge that the word "certain" is very often used as a synonym for "all", or even "various", just as it may be used to mean (as appellee claims) "some among others"; in nine cases out of ten it can be eliminated as so much surplusage without robbing language of its true and intended meaning. To illustrate by example:

"We have certain (various) books of yours";
"We are disposing of certain books of Smith in

our possession" ("all books of Smith in our possession"); "There are certain reasons" (surplusage); "Certain people you know were there" (descriptive and surplusage).

That words in a contract are to be construed in their popular and accepted meaning, see: *Scudder v. Pierce* (1911), 159 Cal. 429, 114 Pac. 571, where the Court said, at page 433:

> "The second consideration is that all parts of a contract are to be given effect if this may be done without doing violence to the manifest expressed intent of the parties, and that the terms of a contract are to be construed according to the ordinary and usual acceptation of the language, unless an intent that they should be construed otherwise plainly appears."

In *Retsloff v. Smith,* 79 Cal. App. 443, 249 Pac. 886, the following is stated, at page 452:

> "The purpose of all construction is to ascertain the intent of the parties. When the intent of the parties is ascertained it must always take precedence over the *literal sense of the terms.*" (Italics ours.)

It was argued that the other bank creditors of Richfield Oil Company, because of the use of the word "certain", understood this telegram as a waiver of appellant's lien. To say that the other bank creditors recognized any such refinement is obviously erroneous. There is no evidence in this case that they or any of them were aware of the nature of any agreement or agreements between Richfield Oil Company and appellant as to the foreign drafts—either the alleged agree-

ments upon which appellee bases his contention herein, or the agreement as understood by appellant. The record is equally silent as to what, if indeed any, interpretation the other bank creditors placed upon this telegram. To appellant, it is quite apparent that the bank creditors, if they thought about this telegram at all, accepted it in the ordinary sense of the language used: "We will return the bank balance, but we reserve our rights against the foreign collections." The action of Security First National Bank of Los Angeles in relinquishing draft proceeds to appellee (R. 335) was cited as proving that the other bank creditors understood that appellant waived its lien upon the drafts in question. Appellant does not know what motivated the Security Bank in taking this action, but in any event the construction which it placed upon its own agreement with the receiver can have no bearing on the proper interpretation of appellant's telegraphic communication to the receiver. Furthermore, the Security Bank made no reservations whatever in its telegram to the receiver. (R. 214, 215.)

Appellee seeks somehow to penalize appellant because in its telegram it used the word "continue", to-wit: "We continue to reserve our rights * * *". What argument can possibly exist as to the use of this word? Obviously what was said and what was meant was that "Notwithstanding our restoration of your bank balance, we are holding your collections as security for acceptances and inform you that we *continue* to reserve our rights to banker's lien, notwithstanding our action in restoring your balance". The right existed prior to the sending of the telegram, if it existed at all, and the bank *continued* to reserve that right.

In *Balfour v. Fresno Canal & Irrigation Co.* (1895), 109 Cal. 221, 41 Pac. 876, the Supreme Court of California uses, at page 227, the following apt language:

> "It is a true and important rule of construction that the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus;* that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done."

Applying this sensible and usual rule of construction, it is submitted that an examination of appellant's telegram as a whole leads but to one conclusion—that appellant reserved its lien upon all Richfield drafts then held by it. Any other construction would be absurd and would totally destroy and render meaningless the words contained in the telegram: "Please understand that we continue to reserve all our rights for banker's lien against these collections".

The following quotation from *Sprague v. Edwards* (1874), 48 Cal. 239, at page 249, fittingly concludes this phase of the argument:

> "It is not the practice of Courts of Justice to divest persons of their estates by a strict interpretation of the language of an instrument when the sense in which the words were used is apparent from other portions of the instrument, viewed in the light of attending facts."

(3) The Circumstances Surrounding the Sending of Appellant's Telegram Prove That no Waiver of Lien on the Drafts in Question Was Intended.

Mr. Eisenbach, the chief credit officer of appellant, and a man to whom, obviously, consideration of the

lien of a bank or its right to offset was not a new subject, received Mr. McDuffie's telegram (R. 452) and sent the reply which appellee here calls into question. (R. 452, 453.) Prior to sending the telegram Eisenbach had been advised by Mr. Hellman, Vice-President, in charge of the Foreign Department (R. 441) that there were drafts and foreign collections of Richfield Oil Company in the Foreign Department. (R. 453.) Mr. Eisenbach prepared the telegram jointly with Mr. Motherwell, a Vice-President of the Bank, writing it at his desk and conferring with him about it. (R. 453.) The telegram was sent in direct reply to appellee's telegram. (R. 458.) Mr. Motherwell testified that he had been Vice-President of Wells Fargo Bank & Union Trust Co. for over five years (R. 460), and prior to that time was with the Federal Reserve Bank for a period of eight years as assistant examiner in San Francisco, managing director of the Salt Lake City Branch and manager in Los Angeles. (R. 460.) He testified that he had had experience with banker's lien and had a definite understanding as to what it was (R. 461); that he was possessed of this information and knowledge at the time of the sending of the telegram; that he knew from Mr. Hellman of the Foreign Department about the Richfield drafts and collections (R. 461), and that with all of this knowledge before him he, jointly with Mr. Eisenbach, prepared the telegram. (R. 462.)

These circumstances materially strengthen appellant's position as to the very obvious meaning of the language used in the telegram, for the manner in which the telegram was sent, the consideration given to it,

proceeds of the drafts as an absolute violation of the agreement with him and the banks (R. 244), and on cross-examination he emphasized his statement by saying, "My recollection is rather clear because the matter was of extraordinary importance." (R. 225.) Mr. Eisenbach testified as to the exact nature of the conversation between him and Mr. McDuffie, and he quoted Mr. McDuffie as saying:

> "I have just received notice that the bank has applied $145,000.00 on its lien, *I am aware that you have reserved that right by your telegram of January 16th,* and now you have exercised the lien, I don't think it is playing cricket."
>
> (R. 453.)

This testimony is supported by that of Mr. McDuffie on cross-examination, in which he said:

> "In substance, I stated to Mr. Eisenbach that I knew there had been a reservation of rights, but I had not expected the bank to exercise these rights."
>
> (R. 226.)

After testifying on cross-examination that he writes shorthand and makes contemporaneous memoranda of important conversations (R. 454, 455), Mr. Eisenbach stated that there was a means of determining the exact date of the telephone conversation with Mr. McDuffie. (R. 456.) At this point in the testimony, the record shows (R. 456) that counsel for appellant tendered to counsel for the receiver Mr. Eisenbach's memorandum of May 11th.

Returning then to the question as to what was Mr. McDuffie's understanding of appellant's telegram of

January 16th, appellant believes that it can answer this question more accurately than Mr. McDuffie did upon the witness stand. Mr. McDuffie understood the telegram as the consent of appellant to do what he requested it to do, namely, to restore the bank balance against which it had previously exercised its banker's lien, and he further understood that telegram, as he subsequently stated to Mr. Eisenbach on May 11, 1931, as reserving appellant's banker's lien against all Richfield's collections in the Foreign Department. On his own testimony he could have had no other understanding. He did not know the details of the transaction; he did not know the provisions of the acceptance agreement; he did not know the amount of the indebtedness on acceptances. He knew and this, we submit, is all he knew, that money had been borrowed upon acceptances secured by drafts deposited for collection with Wells Fargo Bank & Union Trust Co. He did not show appellant's telegram to his counsel, nor did he ask appellant for any explanation of it. He was anxious at that time to get under way with his receivership; he wanted the cash balances restored; he was not then worrying about the future; he desired to reassure each bank that all of them had agreed to the request set forth in his telegrams of January 16th (R. 209); he was not concerning himself, nor was he going to bother the other banks with this reservation of appellant; that, thought Mr. McDuffie, if he thought about it at all, would take care of itself in the future.

(5) Effect of Appellant's Action in Releasing Draft Proceeds to the Receiver.

Appellee further claims that appellant's conduct after the transmission of its telegram of January 16th has evidential force adverse to appellant on the question of waiver of lien. Appellee's contention in this respect is that the subsequent relinquishment by appellant to the receiver of some of the draft proceeds is evidence confirming the interpretation which appellee places on appellant's telegram of January 16th. The trial Court found that the proceeds of foreign drafts were deposited by appellant bank to the credit of Richfield Oil Company and/or its receiver without any claim of right of offset or banker's lien on the part of appellant (Finding XXIII, R. 193), and concluded that, by its agreement and by its conduct subsequent to the deposit of drafts, appellant waived its banker's lien. (Conclusion IV, R. 194, 195.)

Appellee does not and could not under the authorities contend that the relinquishment by appellant of some of the draft proceeds in and of itself was a waiver of appellant's security or lien right as against the balance of the collections in its possession or under its control. In *Bell v. Hutchinson Lumber Co.* (1928, W. Va.), 145 S. E. 160, the directors of a corporation personally paid deficiency income taxes of the corporation under an agreement that they would be entitled to an equitable lien upon the proceeds of the sale of certain timber. The proceeds of this sale were deposited in a bank. The directors

caused part of the proceeds to be applied to other indebtedness of the corporation. The defendant, who claimed the fund under a garnishment, contended that this action of the directors amounted to a waiver of their lien upon the fund. The Court, in holding against this contention, said at page 165:

> "This fact would not impel a conclusion of waiver or abandonment of the lien by appellants * * * The intent to waive or abandon a lien must be shown by clear and convincing proof."

Appellant honestly believes that appellee's interpretation of its telegram of January 16th is so unnatural and illogical that no act of appellant could possibly have confirmed it. With equal seriousness appellant contends that its action in returning the funds subsequent to the appointment of the receiver was consistent with both the original right it claimed and the right reserved in the telegram of January 16th.

Upon Mr. McDuffie's appointment, appellant exercised its banker's lien against Richfield's bank balance, in excess of $40,000.00. Thereafter appellant agreed to cooperate to the extent requested by the receiver, viz.: by restoring the bank balance; but it warned the receiver by its reservation of rights in its telegram of January 16, 1931, that it might not cooperate in the future with respect to the collections in its Foreign Department. Subsequent to the receivership, Mr. Eisenbach was delegated to keep in close contact with its affairs and endeavored to do so. (R. 254.)

It cannot be disputed that, according to the information and belief of Eisenbach, and through him, of appellant, there were several periods in the course of the receivership during which its condition appeared more serious than at other times. The situation appeared most serious to Eisenbach and appellant in the month of February and in the month of May, 1931 (R. 454, 459); reports as to the condition of the company at these times were made by Mr. Eisenbach to Mr. Motherwell, Vice-President, and to Mr. Lipman, President, of appellant bank. (R. 454.) In May, 1931, Eisenbach believed that bankruptcy of Richfield was imminent. (R. 454.) Counsel for appellee sought vainly to destroy the effect of this testimony by asking who threatened bankruptcy and whether it was not a fact that bankruptcy did not actually occur. To this line of questioning, Eisenbach replied:

> "I did not testify that anybody made a threat of bankruptcy. I said I thought bankruptcy was impending."
>
> (R. 457.)

And further:

> "I have not attempted to say that anybody told me that Richfield Oil Company would be put into bankruptcy. My judgment told me that there was a danger of bankruptcy."
>
> (R. 457.)

Whether bankruptcy was or was not imminent, it was Eisenbach's belief that it was, and he so reported to appellant bank.

The substance of Eisenbach's testimony was actually confirmed by Mr. McDuffie, who stated on the witness stand:

> "There were two acute periods in the money affairs of the receivership, one in February and one in May."
>
> (R. 230.)

In May, the acuteness was caused by the necessity of raising money to pay property taxes, and in February the question of gasoline taxes was involved. (R. 123, 124.)

These dates and the changeable financial condition of Richfield Oil Company are important in adding reason to the conduct of appellant in returning draft proceeds to appellee. Bearing in mind the times when the financial situation was most acute and remembering that Mr. Eisenbach was keeping in touch with the affairs of Richfield, meanwhile reporting to Mr. Motherwell and Mr. Lipman, it is quite natural that the two periods when appellant indicated its intention to exercise its reserved right as against the draft collections were in February and May. On February 26, 1931, Mr. Gilstrap of appellant bank wrote a letter to the receiver wherein he stated:

> "The remainder of the proceeds, totalling $7749.58, we are holding in accordance with the notice given you by our wire of January 16."
>
> (Plaintiff's Exhibit 107, R. 303, 304.)

In reply to this letter, appellant received the following telegram:

"Los Angeles Calif 248P Mar 2 1931

WFBATUCO

Attn W. J. Gilstrap

Please repeat telegram dated January sixteenth mentioned in your letter to Lyons of February sixth please answer immediately

RICHFIELD OIL CO OF CALIF

POPE."

(R. 306.)

Appellant then by wire repeated its telegram of January 16, 1931.

Thereafter appellant received a letter from Mr. McDuffie dated March 3rd, referring to the previous communication of February 26th, and stating in part:

"I beg to inform you that all banks transferred the total amount of deposit to the credit of Richfield Oil Company of California on January 15, 1931, to the credit of William C. McDuffie, receiver. *I will therefore appreciate it* if you will kindly credit the remainder of the proceeds as mentioned above, $7,749.58, to the credit of Richfield Oil Company," etc. (Italics ours.)

(R. 302, 303.)

In response to the last communication, appellant, on March 5, 1931, wrote a letter to appellee, stating in part:

"In accordance with *your request,* we are crediting the account of William C. McDuffie, receiver Richfield Oil Company of California, with the sum of $7,749.58." (Italics ours.)

(R. 305, 306.)

The first letter hereinabove set forth sent by appellant to appellee on February 26, 1931, is in line with the knowledge by appellant that in February the condition of the receivership was acute. However, the ultimate relinquishment of the draft proceeds squares with Mr. McDuffie's testimony that by the latter part of February the financial condition of the receivership was no longer as acutely serious as previously. (R. 230.) In this connection, Mr. Gilstrap testified that prior to sending the letter of relinquishment, there was considerable discussion among the officers of the bank. (R. 409).

It should be noted that in the receiver's letter of March 3, 1931, he did not make a *demand* but a *request* in the language, "I will therefore appreciate it." As a reason for his request, the receiver stated that all of the banks had transferred their balances; in other words, he urged appellant not to *exercise its right.* At the trial, counsel for appellee demanded that the language of every letter and every communication by appellant be strictly construed to the prejudice of appellant. If the same yardstick be applied to this letter from Mr. McDuffie, we find, notwithstanding the statement in appellant's letter of February 26, 1931, that it was holding proceeds "in accordance with the notice given you by our wire of January 16" (R. 304), and notwithstanding that the receiver had before him, at his own request, a copy of that telegram of January 16th (R. 307), there is no attempt to deny in the receiver's letter of March

3d that the action of appellant in holding the proceeds was "in accordance with the notice given you by our wire of January 16." The receiver apparently accepted this, as appellant contends, he was required to do.

The letter of the receiver stated that he would appreciate the crediting of the proceeds to his account. With this request before it, appellant determined upon a course of conduct after due and deliberate consideration. Mr. Hellman testified that after the receipt of this letter, he conferred with Mr. Lipman with reference to the subject matter of the letter and of the reply to it. He further testified:

> "I had a conference with officials of the bank with respect to handing back this particular lot of proceeds. At that time the Cities Service Company had just recently made an offer for 500,000 shares of Richfield common stock at $4.00 a share, and was very much interested in the purchase of the company, and it was decided between Mr. Lipman and myself that the money would be returned. Prior to transmitting the proceeds back to Richfield Oil Company, as stated in the letter which is Plaintiff's Exhibit 108, there was a conference held between me and Mr. Lipman with reference to the subject matter of the letter which was subsequently written, and at that time there were facts known to me and to Mr. Lipman to the effect that the receivership of the Richfield Oil Company was in fair probability of being able to work itself out."
>
> (R. 441, 442.)

Thereupon appellant's letter of March 5, 1931 (Plaintiff's Exhibit 108, R. 305, 306), was written, returning the sum of $7749.58 and the further sum of $11,081.52, proceeds of a draft which meanwhile had been received.

From the foregoing it is quite apparent that the facts do not sustain the argument made by counsel for appellee at the trial to the effect that when appellant received appellee's letter of March 3, 1931 (R. 302, 303), it readily concluded that the receiver was entitled to the funds and that it had no claim against them. The facts are just to the contrary, for the transfer was made after due consideration of the financial condition of Richfield Oil Company and of the question as to whether appellant bank's cooperation should continue.

The condition of the receivership again changed for the worse in May, 1931. The 180 day Birla Bros. drafts matured in the early part of the month. On May 8th, Hall telephoned to Gilstrap inquiring as to the cost of cabling the proceeds of these drafts from Calcutta. (R. 386, 387.) Thereafter, Richfield wrote a letter requesting that the proceeds be transmitted by cable. (R. 310.) Meanwhile, on the same day, Gilstrap reported to Hellman that Hall had telephoned about the proceeds. (R. 387.) As a result of this conference, Gilstrap telephoned back to Hall, telling him that "the bank had decided to take the proceeds of the two Birla Bros. drafts deposited on October 8th, and apply them against Richfield's indebtedness." (R. 387.)

Meanwhile, there had been numerous conferences at appellant bank, participated in by Hellman, Motherwell, Eisenbach and Lipman, with respect to the exercise of its lien by the bank. Lipman specifically stated on the witness stand that there was no discussion as to the bank's *right* to exercise the lien, but that there were discussions as to procedure (R. 450); Motherwell testified to the same effect. (R. 460, 461.)

It is submitted that the only inference which may fairly be drawn from the relinquishment by appellant to appellee of the proceeds of some of the Richfield drafts is that appellant was cooperating with the receiver during the period when it thought that cooperation was advisable, to the extent and for the time that in its best judgment it thought proper. It withheld making a final decision against appellee until the very end, cooperating, meanwhile, to its own loss, but secure in the just belief that it had notified appellee of what it ultimately might do (and subsequently did) by the reservation in its telegram of January 16th. That appellant understood this telegram as reserving a lien on all Richfield foreign drafts cannot be questioned in the light of its letter of February 26, 1931, in which it informed Richfield of its intention to hold the proceeds of the designated drafts in accordance with its said telegram. The existence of this letter emphasizes the subsequent relinquishment of draft proceeds as cooperation with the receiver.

If the source of these proceeds be examined, conclusive proof is found that the relinquishment thereof to appellee is meaningless in connection with the ques-

tion of waiver of lien. The first sum of $7749.58 released to the receiver consisted for the most part of proceeds of drafts claimed by appellee not to have been deposited under the acceptance agreement, to-wit, drafts Nos. 113,009, 113,018 and 123,008. (R. 303.) In an earlier part of this brief appellee's claim that these drafts were not deposited under the acceptance agreement was presented and considered. But also included in this sum were the proceeds of a part payment on draft No. 103,012 (drawn of Bueno y Cia) (R. 303, 304), which, as previously noted, appellee admitted, and the Court found, was deposited under the acceptance agreement. (Finding XV, R. 188, 189.) On appellee's own interpretation of appellant's telegram of January 16, 1931, that a lien was reserved only upon those drafts which appellee claims were deposited under the acceptance agreement, the inclusion of the proceeds of draft No. 103,012 in the amount credited to the account of the receiver renders the relinquishment thereof, if of any probative value on the question of waiver of lien, evidence against appellee's interpretation, in that appellant thereby relinquished to the receiver funds from a draft which appellee admits was deposited under the acceptance agreement and against which a lien had undisputedly been reserved.

In addition to appellee's argument that the relinquishment by appellant of these draft proceeds gives some support to his interpretation of appellant's telegram of January 16, 1931, appellee likewise seizes upon this relinquishment to support his argument that a waiver was effected at the inception of the foreign

draft transactions in October, 1930. The lower Court accepted this argument in its opinion. (R. 177, 187.) Here again, it is submitted, that the relinquishment can mean nothing, except possibly to rebut appellee's contention, in the face of the fact that an installment of the proceeds of draft No. 103,012 received in May, 1931, are admitted to have been properly applied to the liquidation of Richfield's general indebtedness to appellant. To be more specific, *appellant relinquished the proceeds of a draft upon which appellee admits appellant had an enforceable lien,* as well as the proceeds of drafts upon which appellee alleges the lien was waived. How can this action, then, be confirmatory of an understanding on the part of appellant that it at any time waived its lien upon the drafts, the proceeds of which are here in dispute?

(6) The Effect of the Claims Filed by Appellant Bank in the Receivership Proceedings.

On the 28th day of March, 1931, appellant herein filed its Proof of Claim in the receivership proceedings. This proof of claim set forth the fact that Richfield Oil Company of California was indebted to appellant in the sum of $636,189.95 for moneys loaned to Richfield and that this indebtedness was evidenced by a promissory note dated July 12, 1930. It also recited that no securities were held by claimant for said indebtedness. (R. 366, 367.) A further proof of claim was filed by appellant for the additional sum of $1028.85 for services rendered as registrar of Richfield's preferred and common stock. This claim likewise stated that no securities were held by claimant for said indebtedness. (R. 367, 368.)

Appellee, applying the same argument to these claims as he did to the relinquishment of the draft proceeds, contended that the allegation that the claims were not secured was illustrative of the understanding of appellant that by its telegram of January 16, 1931, it waived its banker's lien upon the drafts in dispute. At the trial, it was expressly admitted by counsel for appellee, and will no doubt be similarly conceded here, that these proofs of claim in and of themselves would not operate as a waiver of appellant's lien or right of setoff. In view of this concession it is unnecessary to cite from the long line of cases holding that failure to allege the existence of security in a claim filed in an equity receivership does not act as a waiver of the security.

The circumstances surrounding the filing of the claims show that it was entirely through inadvertence that they did not recite that the drafts in question were security for the general indebtedness of Richfield to the bank.

On March 14, 1931, appellant sent a letter to Heller, Ehrman, White & McAuliffe, its attorneys, requesting that they prepare a claim in the receivership proceedings covering this indebtedness of Richfield to appellant. (R. 463.) The attorneys prepared the claim and by letter of March 27, 1931, forwarded it to the bank for signature by the proper officer. (R. 463.) On the same date the attorneys sent to appellant a claim against the receiver for services rendered as registrar of Richfield's preferred and common stock. In none of this correspondence between the bank and its attorneys was the question of security discussed.

It should be remembered that appellant is a comparatively large San Francisco bank engaged, through various departments, in the manifold activities of a modern bank and trust company. The employee in the Note Department who requested counsel to prepare these claims was unaware of the existence of the collections in the Foreign Department. Furthermore, it is apparent that the attorneys inadvertently failed to question the officers of appellant as to the existence of any security. Additional proof of inadvertence on the part of appellant is found in the fact that the claim for the note indebtedness was signed by F. I. Raymond, Vice-President and Cashier of Wells Fargo Bank & Union Trust Co. In the entire record of this case, this is the only time that Mr. Raymond's name appears. It is clear that he had nothing whatever to do with, and consequently no knowledge of, the foreign draft collections of Richfield. The proof of claim for services as registrar was signed by A. J. Callahan, Assistant Trust Officer of appellant, and this is the only time that his name appears in the entire record of the case. It is obvious that as Assistant Trust Officer he would be ignorant of the collections in the Foreign Department.

Thereafter appellant by order of Court was allowed to file an amended proof of claim. (R. 464, 465.) This amended claim alleged that the information for the first claim had been compiled by the Note Department of appellant bank which was a separate department from the Foreign Department; that said Note Department had no records of collateral or other security deposited with the Foreign Department; that through

inadvertence and lack of knowledge of the Note Department, said Richfield claim stated that there were no offsets or counterclaims to the debt set forth in said claim, and that no securities were held by the claimant for said indebtedness; whereas, the facts were that unknown to the Note Department the drafts and the proceeds thereof involved in this litigation were held in the Foreign Department as security for all of the Richfield indebtedness. (R. 465.)

It is submitted that if the first proof of claim filed by appellant might otherwise have had some probative force, the amended proof is cogent evidence as to exactly what the understanding of appellant was, and operates completely to nullify the contentions of appellee based on the first proof of claim.

No effort was made to amend the comparatively small claim for services as registrar, but this can have no bearing on the issues involved herein since appellant is only holding the proceeds of the drafts as against the general note indebtedness of Richfield Oil Company to it.

It is submitted that the inadvertence or the carelessness of appellant and its counsel in the preparation of its proofs of claim should not be considered by the Court as in any way prejudicial to any substantive rights which appellant possessed. This case, it is respectfully urged, involves conflicting claims to a large sum of money and substantial legal and equitable rights. It should be determined upon the merits, unaffected by excusable inadvertence in the preparation of documents.

(b) As a Matter of Law, Appellant Did Not Waive Its Lien Subsequent to the Appointment of the Receiver.

(1) The Telegram is Silent as to Waiver of Lien.

Despite all of the labored reasoning which counsel for appellee offer in support of their position that appellant in its telegram of January 16, 1931, waived its banker's lien, there is one vital weakness in this position which renders all of such reasoning futile. This is the fact that nowhere in said telegram can there be found any statement that appellant intended to waive its lien—not even ambiguous language to that effect.

Appellee's legal position in this regard has been that since, according to his contention, appellant reserved its lien only upon the drafts admittedly deposited as security for acceptances, as a matter of law it waived its lien upon all other drafts by failing to assert it. This proposition is unsupported by decisions of any Courts, but on the contrary is negatived by the authorities which will hereinafter be cited.

Appellee sought in the lower Court to sustain his position by the citation of the very early case of *Brown v. Gilman* (1819), 4 Wheaton 255, particularly the language of the Supreme Court at page 289:

> "The express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of that lien to any greater extent."

Although this quotation has a specious bearing upon the issues involved herein, an analysis of the facts in the case cited completely robs it of any value as support for appellee's contention.

In *Brown v. Gilman* certain real property was sold, the vendor well knowing that the purchase was for the purpose of resale. The seller claimed an equitable vendor's lien upon the property, and the question was whether, assuming that the law recognized such a lien, the vendor had waived it in the agreement of sale. The contract contained an express stipulation that the property should remain liable for the first payment but that separate security should be taken for the residue of the purchase money. This agreement, of course, strongly indicated an intention to waive a vendor's lien for the balance of the price. The conclusion that such was the intent was as inescapable as if there had been an express waiver. It is impossible to contend logically that there is any parallel between this agreement and that involved in the case at bar. And more important, the reservation to a specified extent and the equivalent waiver to the greater extent, applied in the cited case to *exactly the same property.* Appellee would have this Court believe that a reservation of a lien upon one property item is a waiver of lien upon other property where there is a contemporaneous failure to assert the lien upon the latter. There is no authority for this. It is, moreover, unfounded in law, for, assuming that appellee is correct in his argument that not all of the drafts were deposited under the acceptance agreement and that the reservation in the telegram of January 16, 1931, referred only to those drafts which actually were so deposited, nevertheless, the circumstances did not impose any *obligation* or *duty* on the part of appellant to come forward on January 16, 1931, and expressly

reserve its lien upon the drafts which, according to appellee's contention, were not deposited under the acceptance agreement.

The only rule of law which in any manner approaches that for which appellee here contends provides that assertion by the lien holder of a title to the property inconsistent with the lien, effects a waiver of the lien. For instance, if the lien holder asserts that he has full title to the property he thereby waives his lien. See *Williams v. Ashe* (1896), 111 Cal. 180, 43 Pac. 595; *Sutton v. Stephan* (1894), 101 Cal. 545, 36 Pac. 106.

It is hardly necessary to comment upon the absence of any statement in the telegram in question inconsistent with the existence of a lien on the drafts involved herein.

A. Appellee has the Burden of Establishing the Alleged Waiver.

The burden rests upon appellee to show to a certainty that appellant, after the appointment of the receiver, waived its right to banker's lien.

In *Aronson v. Frankfort Ins. Co.* (1908), 9 Cal. App. 473, 99 Pac. 537, the Court said, at page 480:

> "A waiver in law is the intentional relinquishment of a known right; and the burden is upon the party claiming such waiver to prove it by such evidence as does not leave the matter doubtful or uncertain."

So likewise in *Mott v. Cline* (1927), 200 Cal. 434, 253 Pac. 718, at page 451 the Court said:

> "The burden is on the party asserting a waiver to introduce evidence of the facts constituting it."

Not only does the burden of proving that appellant waived its lien rest upon appellee, but the law presumes that appellant did not intend such waiver. Appellee may overcome this presumption only by clear and convincing evidence to the contrary. The record is totally lacking in such evidence.

In *Rader v. Starr Milling & Elevator Co.* (1919), 258 Fed. 599, 606, the following language appears:

> "The legal presumption is that one who has a legal and equitable lien on property intends to maintain and enforce it and his abandonment thereof may not be adjudged without clear and convincing evidence of his intention to abandon."

In *McBride v. Beakley* (1918, Tex.), 203 S. W. 1137, 1138, the Court said, quoting from Ruling Case Law:

> "To sustain this loss of lien (that is by waiver) it must be placed on one or the other of two ideas; intentional waiver or from the loss of possession. As to the first, authority is abundant to show that *one will not be held to waive a lien unless the intent be expressed or very plain and clear; the presumption is always against it.*" (Italics ours.)

Exactly the same language appears in

> *Lambert v. Micklass* (1898 W. Va.), 31 S. E. 951 at page 952;

and in

> *Rosenbaum v. Hayes* (1901 N. D.), 86 N. W. 973, at page 980.

In *Slide v. Spur Gold Mines & Seymour* (1894), 153 U. S. 509, 517, the Court, in speaking of the waiver of a vendor's lien, said:

> "An intent to abandon it is not to be presumed, and while, of course, like any other right, it may

> be abandoned or waived, the evidence of an intent to so abandon or waive should be clear and satisfactory."

In *Adams v. Harvey* (1924, Wash.), 225 Pac. 407, it was claimed that plaintiff had contracted not to exercise a lien. At page 410, the Court said:

> "In several cases we have held that there was a waiver of the right of lien, but in each instance the waiver was specific and no reasonable doubt could exist as to what was meant. * * * *We would not be justified in holding that a claim of lien has been waived unless we can say that it was clearly understood between the parties that such should be the case."*

To the same effect see *Treeman v. Frey* (1929, Okla.), 282 Pac. 452.

The cases previously cited with reference to the waiver of mechanics' liens are equally applicable here. Likewise, the cases last cited apply with like effect to the question of whether appellant waived its lien at the inception of the foreign draft collection business in August, 1930, and, it is submitted, preclude the interpretation placed by appellee upon Mr. Hall's instructions.

In light of these cases, how can it be successfully maintained that appellant waived its lien in the telegram of January 16, 1931, especially in view of the fact that there is no statement in said telegram inconsistent with the retention of such lien? The Court's attention is particularly invited to the italicized portion of the quotation from *Adams v. Harvey,* the case last quoted. When the conclusion that appellant waived

its lien can be reached by counsel for appellee only through the subtle mental processes to which counsel have resorted, it is certainly improper to state that "it was clearly understood between the parties" that the lien was to be waived.

It was further contended by appellee at the trial that if appellant's theory that all drafts were subject to a contractual lien under the terms of the acceptance agreements is correct, appellant, in reserving its banker's lien in the telegram of January 16, 1931, reserved something it did not possess, and consequently waived its right to a contractual lien through failure to assert the same. The arguments heretofore advanced and the cases cited are equally applicable to this contention. The banker's lien would be no greater in extent than the contractual lien; consequently there was no inconsistency in the reservation of a banker's lien if, as a matter of fact, the lien right was contractual. And again, it is submitted that under the authorities hereinbefore cited, waiver of lien, created by contract or by operation of law, does not result from a mere failure to assert it. Furthermore, the evident intention of the framers of the telegram in question was to reserve security, whether this be technically called banker's lien or contractual lien. The use of the technical words "banker's lien" must give way to the evident intention. The following quotation from *In re City and County of San Francisco* (1923), 191 Cal. 172, 177, 215 Pac. 549, is here pertinent:

> "The object to be obtained is, of course, the principal factor of consideration in the construction of contracts."

See also *Van Slyke v. Arrowhead, etc.* (1909), 155 Cal. 675, 102 Pac. 816.

(2) There Was no Consideration for the Alleged Waiver of Lien.

It will be assumed for the purposes of this part of the argument that appellee and the Court below are correct in their construction of the telegram of January 16, 1931. But even adopting their interpretation the telegram would amount merely to an executory promise to waive the lien as to all proceeds of drafts which were not included in the sum which on that date was actually transferred to the account of the receiver. The question which naturally follows is: Where is the consideration for such promise of waiver?

An essential element of an effective waiver of lien, or a waiver of any rights, is the support thereof by a sufficient consideration.

In *Clark v. Costello* (1894), 29 N. Y. Supp. 937, the Court said, at page 940:

> "The referee finds that the defendant promised the plaintiff to ship the machine from Amsterdam to the plaintiff at Elmira. Assuming this to be sustained by the evidence, it would not necessarily follow that there was a waiver of the lien. It has been held that an agreement to give up a lien, in order to be obligatory, must be based on a legal consideration."

In *Abbott v. Nash* (1886, Minn.), 29 N. W. 65, the following language appears at page 67:

> "The writing which is claimed to waive or release plaintiff's lien right, does not appear to be supported by any consideration and is therefore ineffectual."

In *Smith v. Minneapolis Threshing Machine Co.* (1923, Okla.), 214 Pac. 178, the Oklahoma Court stated, at page 180:

> "A waiver, to be operative, must be supported by an agreement founded upon a valuable consideration."

In *Bronson v. Northwestern Mutual Life Insurance Co.* (1921, Ind.), 129 N. E. 636, 640, it was held that:

> "There is no claim of a waiver before April 4, 1916, and thereafter there could have been in this case no waiver by agreement, for at the time of the act of appellee in sending the notice, the insured was not living, and there could have been no agreement with him; further there was no consideration for a waiver by agreement. It must appear that it was the intention of the parties so to waive, and that such waiver by agreement was supported by sufficient consideration."

To the same effect see:

Reynolds v. Detroit Fidelity & Surety Co. (1927), 19 Fed. (2) 110;

Davis v. Standard Accident Ins. Co. (1929, Ariz.), 278 Pac. 384;

Jobst v. Hatten Bros. (1909, Neb.), 121 N. W. 957;

Western National Bank of Hereford v. Walker (1918, Tex.), 206 S. W. 544;

Propst v. Haulley Co. (1919, Ore.), 185 Pac. 766;

Crocker v. Page (1924), 206 N. Y. Supp. 481.

Any claim that the consideration for this supposed promise may be found in the promise of the other

banks to turn over their Richfield accounts and the subsequent actual transfer thereof, is unsound. The record is barren of any agreement made by appellant with any other banks to transfer their Richfield accounts. All negotiations upon which any legal results may be predicated were conducted directly with the receiver through the medium of the telegrams hereinbefore mentioned. This is clearly established by reference to these telegrams. At the expense of repetition, the pertinent part of appellee's telegram to appellant is quoted again:

> "As receiver I am ordered by Federal Court to take over all assets including cash in bank stop While you have undoubted right of offset, such right if exercised will seriously cripple receiver's operations Local banks have indicated they will acquiesce in this program."

This is a request directly from the receiver. It contains nothing to the effect that the other banks would promise to transfer their accounts if appellant would agree to do likewise.

The recital in the telegram of the acquiescence of the other banks is merely a statement of a fact placed therein for whatever persuasive effect it might have upon appellant. It does not amount to an offer on the part of the other banks to transfer their accounts if appellant would transfer its account.

Appellant's reply telegram was sent directly to the receiver, and its terms were not addressed expressly or impliedly to any one else. The pertinent part of this telegram is as follows:

> "Replying telegram we are willing to restore into your name as receiver Richfield balance in checking account provided we are notified by you that all company banks have taken similar action * * *."

The last part of this telegram, commencing with the word "provided", does not purport to be a promise or an offer to the other banks or an acceptance of any offer from them. It is merely a statement of a condition precedent to action on the part of appellant, addressed to appellee as receiver.

Giving appellant's telegram the construction (that is, as a promise to waive the lien) contended for by appellee, it still would amount only to an offer to *appellee.* It is elementary that an offer made to a particular person may be accepted by him alone, and becomes a contract only if accepted and supported by legal consideration.

> *Boston Ice Co. v. Potter* (1877), 123 Mass. 28;
> *National Bank v. Hall* (1824), 101 U. S. 43;
> *Boyd v. Calkins* (1928, Kans.), 268 Pac. 749;
> *Strauss & Co. Inc. v. Berman* (1929, Penn.), 147 Atl. 85.

Consequently there is no foundation for appellee's theory that appellant was contractually obligated to the other bank creditors; nor is there any support for the further contention that the continuation by appellee of his duties as receiver was a sufficient consideration to support the alleged promise of waiver on the part of appellant. At the most, such continuation in office was simply the motive or inducement

which prompted appellant to promise waiver of its lien, again assuming that there was such a promise. In other words, there is nothing in this case which shows that appellant was bargaining for the continuation by appellee of his duties as receiver.

In *Williams v. Hasshagan* (1913), 166 Cal. 386, 137 Pac. 9, the following pertinent language appears, at page 390:

> "Mere motive or inducement or hope of profit is not consideration. 'If a motive alone were equivalent to a consideration, every promise made free from fraud, duress and the like, would necessarily be enforceable without any consideration.' (Page on Contracts, sec. 275. See, also 9 Cyc. 320.)"

(3) Appellant is not Entitled to Rely Upon the Doctrine of Estoppel.

Because of the absence of consideration for the alleged waiver of its banker's lien on the part of appellant, appellee must necessarily fall back on the doctrine of estoppel. But before appellee may properly take advantage of an estoppel he must show that he himself relied upon the alleged misrepresentations to his detriment. There is no evidence in this case of any such reliance, but instead appellee seeks to establish that others, not parties to this proceeding, are the ones who relied thereon to their detriment, to-wit, the other bank creditors of Richfield Oil Company. This in turn is based upon the transfer to the Receiver of their Richfield balances by these banks, supposedly in reliance upon the relinquishment by appellant of its balances and draft proceeds. If these banks have any rights at all in the premises, appellant again submits

that such rights were satisfied by the relinquishment of Richfield's cash balance with appellant in January, 1931. There is no evidence in the record of this case that the other bank creditors had any knowledge of the draft collections with appellant. If any bargain at all for relinquishment was made between appellant and the other banks it did not extend beyond the cash balances.

A. The Other Bank Creditors are not Parties.

However, appellee has no standing to assert in this proceeding the estoppel rights of such bank creditors for they are not parties to this action.

In *Williams v. Purcell* (1914, Okla.), 145 Pac. 1151, the defendant attempted to invoke an estoppel against the plaintiff on the ground that one not a party to the action had relied to his detriment upon a letter written by plaintiff to defendant. At page 1156, the Court disposed of this mistaken contention in the following language, quoted from 16 *Cyc.* 777:

> " 'Estoppels operate only between parties and privies, and the party who pleads an estoppel must be one who has in good faith been misled to his injury.' "

In *Farmers' State Bank of Gladstone v. Anton* (1924, N. D.), 199 N. W. 582, it was said in the headnote:

> "Where the representations which it is contended give rise to an estoppel were not made to or intended for the benefit of the party who seeks to predicate an estoppel thereon, or where the representations are not general or intended to

> influence third persons, the public at large or persons occupying a relation to the subject matter of the representations similar to that of him to whom they were made, no estoppel arises of which a third person can take advantage."

To the same effect are the cases of:

Christian v. Fancher (1921, Ark.), 235 S. W. 397;

Brickley v. Edwards (1892, Ind.), 30 N. E. 708;

Verrell v. First Natl. Bank of Roseberg (1916, Ore.), 157 Pac. 813.

In *Mercantile Trust Co. v. Sunset etc. Co.* (1917), 176 Cal. 461, 168 Pac. 1037, the Court said, at page 472:

> "It is of the essence of an estoppel in pais that the party asserting such estoppel should not only have been ignorant of the true state of facts but that he should have relied upon the representation or admission of the adverse party."

B. The Receiver Does not Represent the Other Bank Creditors. He Cannot Assert Their Rights Against Appellant.

Appellee attempted to circumvent the rule announced in the foregoing authorities by the argument that appellee as receiver represented all the creditors and therefore was entitled to assert their rights in this proceeding. This is another proposition which has no merit in law. Appellee may cite cases holding that the receiver represents the interests of the creditors to the extent that he is entitled to go out and gather in all the assets of the receivership estate for their benefit. But there are no cases which hold that the receiver is entitled to assert these rights which are private and

peculiar to any one creditor or group of creditors. In fact, the cases are to the contrary.

In *United States Mortgage & Trust Co. v. Missouri K. & T. Ry. Co.* (1921), 269 Fed. 497, plaintiff, as trustee under a trust deed executed by a railroad corporation, brought suit against various corporations which were part of the complicated financial structure of the railway. All of these corporations were in receivership, but the assets held by the receivers of only two of the corporations were directly involved. On the application for leave to sue the other corporations and the receivers thereof the trial Court first denied leave to sue the receivers, and then, on the ground that said receivers were indispensable parties, refused to allow a joinder of the corporations whose assets said receiver held. The Circuit Court of Appeals in reversing this Order as to the corporations themselves, said at page 501:

> "The receiver of the Oklahoma and Kansas corporations has no title or right of property of any of the parties vested in him. He is an indifferent person appointed as custodian to hold the property of said corporations subject to the further order of the Court. Where an attempt is made to take property out of his possession, then he is a proper party to litigation, and where relief is sought against his acts as such receiver, he is the proper party litigant; but where the litigation affects the rights of parties in property not in his hands or asserts rights in such property without disturbing his possession thereof, he is not a proper party, much less an indispensable party to such litigation * * * *A receiver does not represent the justiciable rights*

of the parties to the litigation of which he is receiver, but only the protection of the property in his hands as such or the collection of that to the possession of which as receiver he is entitled." (Italics ours.)

In 53 *Corpus Juris,* p. 135, the rule is stated as follows:

"While for some purposes a receiver is treated as a representative of the person whose property he is appointed to administer or of other interested parties, strictly speaking he is not, in the execution of his trust and the management and disposition of the property committed to his possession, the representative or agent of any such person or party * * * A receiver is, rather, for the time being, a ministerial officer, and representative of the Court having charge of the receivership * * *"

To the same effect see:

Bingamon v. Commonwealth Trust Co. (1924), 1 Fed. (2) 505;

Matarrazzo v. Hustis (1919), 256 Fed. 882;

Goodman Mfg. Co. v. Pittsburgh-Buffalo Co. (1915), 222 Fed. 144;

Kansas City Terminal Ry. Co. v. Central Union Trust Co. (1923), 294 Fed. 32.

The case of *Equitable Trust Co. v. Great Shoshone etc. Water Power Co.* (1917), 245 Fed. (9th Circuit) 697, is illustrative of appellant's contention on this phase of the case. There a mortgage of property belonging to a corporation in receivership brought an action to foreclose, joining the receiver. Several judgment creditors of the corporation, claiming liens,

were allowed to intervene. This Court held that such intervention was proper. The implication in the decision and opinion is strong that the receiver was not a representative of the creditors as to their private rights; if he had been intervention would not have been necessary.

It is true that there is a line of authority composed of a few cases in which the receiver has been loosely said to represent the creditors. Among such decisions are:

Hamor v. Taylor-Rice Engineering Co. (1897), 84 Fed. 392; and

King v. Pomeroy (1903), 121 Fed. 287.

In the latter case the receiver sued stockholders of the corporation in receivership on their stockholders' liability. The Court stated that the receiver was the representative of the creditors and held that these liabilities were assets of the estate just as much as they were assets of the creditors, and being assets of the estate, the receiver therefore had a right to collect the same for the benefit of all creditors; it was in this connection only that the receiver was referred to as representing the creditors. A different result follows when the question is as to whether the receiver may enforce rights of the creditors growing entirely out of transactions between them, or some of them, and third persons.

The Court, in *La Follett v. Akin* (1871), 36 Ind. 1, 6, clearly shows the manner in which this loose reference to the representative character of the receiver is often used. Quoting from the case of *McHarg v. Donnelly*, 27 Barb. (N. Y.) 100, the Court said:

"It is sometimes said, a little loosely, that a receiver represents all the parties. This is well explained in the case of *McHarg v. Donnelly,* 27 Barb. 100, where Hogeboom, J. in delivering the opinion of the Court, said: 'I am aware that it has been held that for certain purposes—for example, setting aside a fraudulent assignment—the receiver represents the creditors of the judgment debtor. But he is so characterized simply in contradistinction to his being representative of the judgment debtor. He is said to represent the creditors, because he represents the estate of the judgment debtor, in which the creditors are interested as well as the debtor himself.' "

C. The Receiver Cannot Enforce Personal Rights of Creditors Arising Subsequent to His Appointment.

In the case at bar, appellee seeks to enforce the personal rights of creditors of Richfield Oil Company supposed to have arisen through the breach of an alleged contract made and entered into subsequent to the appointment of the receiver, or through a purported estoppel as of that time. The authorities are numerous that the representative character of a receiver applies only to such rights as exist at the time of his appointment. The following quotation from *Equitable Trust Co. v. Great Shoshone etc. Water Power Co.* (supra), at page 703, is sufficient to show this:

"We quite agree with the learned counsel for the appellants that, in the absence of specific state statute or decisions of the state courts conferring special rights and powers, and where he is not appointed for the purpose of impounding it for a specific purpose, the appointment of a receiver of property by a federal court is for the protec-

tion and preservation of all rights and interests therein *existing at the time of such appointment.*" (Italics ours.)

The rights here involved have nothing to do with the conservation of the assets of the estate. They are rights personal to a class of creditors, the bank creditors, separate and distinct from the receivership proceedings. Therefore, the cases herein cited to the effect that the receiver is not a representative of the creditors are controlling. And since these creditors are not parties to this action, appellee is not entitled to enforce any rights which they may have by virtue of a supposed estoppel in their favor against appellant.

(4) The Trial Court Erred in Admitting Testimony Regarding the Meetings of the Richfield Bank Creditors and the Communications Between These Creditors and the Receiver.

Mr. McDuffie and Mr. Nolan were allowed to testify, over the objection of appellant, as to what was said at two meetings of the bank creditors of Richfield Oil Company. (R. 205, 206, 207, 208, 240, 241, 242.) No representative of appellant bank was present at either of these meetings. The purpose of the testimony was obviously to show that an agreement was entered into between the bankers present that they would waive the liens of their banks upon the accounts of Richfield. Since appellant was not represented at these meetings, there can be no question but that the evidence as to what occurred was hearsay, incompetent, irrelevant and immaterial and not binding upon appellant. (Assignment of Errors VIII (a), R. 481, 482.) Nor was the objection to this testimony cured by the evidence of Mr. Nolan that he communicated the *substance* of

what occurred at the meeting by telephone to Mr. Eisenbach of appellant bank. (R. 242, 243.) This was an unsolicited communication to appellant and there is no evidence whatsoever that appellant acquiesced in that which Mr. Nolan communicated to it. In fact, the evidence is that Mr. Eisenbach said nothing as to what appellant's course of action would be. (R. 243.) Nor can any such acquiescence be obtained from the telegram of January 16, 1931, to the receiver. This telegram was only a communication between the receiver and appellant bank, in response to one sent by the receiver to appellant. It cannot possibly be construed as an agreement with the various bankers. Appellant submits that if there was any agreement, it was solely between appellant and the receiver. Consequently, and for the other foregoing reasons, the evidence as to what was said at the meetings between the bankers was inadmissible.

The same reasoning applies to the admissibility of the telegraphic and letter communications between the other bankers and appellee. (R. 211, 217.) Objection was made by appellant to their introduction in evidence. It is now submitted that the Court below erred in overruling all such objections. (Assignment of Errors VIII (b), R. 482.)

CONCLUDING SUMMARY.

(a) Of the Facts.

The drafts, the proceeds of which are the subject of this litigation, were either deposited under the acceptance agreement or they were not. If under the agree-

ment, its language to the effect that they are security not alone for the acceptances issued thereunder, but likewise for "any other liabilities from us (Richfield) to you (bank), whether then existing or thereafter contracted", is controlling. The evidence is overwhelming that the drafts were deposited under the agreement. Mr. Hall's negotiations were for a line of credit upon an acceptance basis, and Mr. Lipman told him that this line would be advanced upon the security of foreign drafts to be deposited by Richfield. The terms of the acceptance credit were reduced to writing in the acceptance agreement, executed by Richfield on October 4, 1930, and delivered to appellant October 6, 1930. Each and every transaction with respect to the deposit of drafts with appellant followed the establishment of this line of credit and the execution of the agreement. The first items involved were the four Birla Bros. drafts and the first letter subsequent to the execution of the agreement was the Lyons letter (R. 316) emanating from Richfield and directing the issuance of acceptances for $115,000.00 *against* the Birla Bros. shipment. Contemporaneously, the letter of transmittal and the four Birla Bros. drafts were delivered to appellant. Thereafter the other drafts were deposited and the procedure with respect to each and every one of them was alike,—in the forwarding by Richfield, the letters of transmittal, the receipt of the drafts and the handling thereof by appellant. Nothing intervened to change or alter the instructions or the character of the obligations under the agreement. To meet this situation, appellee was compelled to resort to a fiction that his evidence does not sustain, viz., that a specified few of the drafts were to be

deposited as security for specific acceptances and that the remaining drafts were forwarded solely for collection. This is unwarranted and, at best, rests upon a misconception as to the manner in which the bank was to issue its acceptance, that is, based principally upon or measured by certain satisfactory drafts forwarded to and deposited with the bank, all of which, however, were security for the advances. The most casual comparison of the records of Richfield which were composed only of the uncommunicated "little pencil memorandums", with the records of appellant, consisting of the carbon copies of the letters of transmittal, marked "Security for acceptances, proceeds to Clemo" (R. 377 et seq.) and the ledger page (R. 394 et seq.) substantiates appellant's position that the transaction was a single one and that all drafts were deposited as security for acceptances.

Important likewise is the fact that a continuous or a revolving credit was intended. Mr. Hall, himself, characterized it as a "credit line." Mr. Hellman and Mr. Lipman referred to it as a "loan line" or a "credit line." All the advances were not made under it at one time, but only as the acceptances were issued. It was a credit admittedly, not a mere loan, and under the operation of the credit, as acceptances were paid further advances within the loan limit could be made. Appellant's records again substantiate this, as does the testimony with respect to the establishment of the credit and the agreement that the same was cancellable. The fact that in the few days prior to the receivership, when for the first time acceptances had been paid and additional credit made available, Rich-

field did not use the credit, is no argument that the credit did not exist, since during a period of over a month in October and November, 1930, when admittedly the sum of $20,000.00 under the credit had not been used by Richfield, no request for acceptances was made.

But if despite all this, it is believed that the drafts here in question were not deposited under the acceptance agreement, none the less, they are all subject to appellant's banker's lien or right of setoff. On appellee's own theory they certainly were not deposited as security for any specific indebtedness and consequently were not subject to the rule of *Berry v. Bank of Bakersfield* (supra). Appellee claims an agreement waiving this lien based entirely upon the alleged statements of Hall that the "transaction is to be kept separate and apart." Accepting this at its face value, it does not constitute a waiver of lien, particularly in view of the knowledge of all the parties, including Mr. Hall, of the existence of the lien right at the time the so-called agreement was made. In asking that the transaction be kept separate, if indeed he did so ask, Mr. Hall desired only that it not interfere with the loan line of Richfield (otherwise the treasury officials of the company would not approve it); he undoubtedly likewise desired that, for accounting purposes, the proceeds should go through his department so that he could more readily ascertain what his commissions would be. But here again the probabilities are all against the agreement for which Hall contends. The parties did not discuss and were not bothered about any banker's lien. Rich-

field had in the previous July borrowed an additional $125,000.00 and its credit was still deemed good. The parties were simply concerned with the line of credit, and the new one about to be established.

Apparently realizing the logic of appellant's position that either the drafts were under the acceptance agreement and subject to its terms, or not under the acceptance agreement but subject to banker's lien and right of setoff, appellee has resorted to an alleged waiver of all liens by an exchange of telegrams between appellee and appellant. Appellant stands flatly and positively upon the language of the telegraphic exchanges. It believes that the framers of the telegrams meant what they said—that the request was to transfer the cash balances, and that this request was complied with. Appellant believes that nothing transpired at the meeting with the bankers, assuming the competency of the evidence thereof, which in any way militates against this fact. Appellant believes that the telegrams should be taken by their four corners and the intention of the parties determined therefrom. The unnatural, strained and artificial interpretation sought by appellee to be placed upon his telegram and appellant's answer defeats itself by its very unnaturalness and its illogical artificiality.

(b) Of the Law.

Each of the propositions of fact urged by appellant finds full support in the authorities. The burden of proof with respect to the agreement is not, as appellee contends, upon appellant, but upon appellee. The answer is an affirmative traverse, and the burden has

not shifted. There is no doubt anywhere in the authorities but that if the acceptance agreement controls, so does its provision that the security for the acceptances is security likewise for the general indebtedness of Richfield to appellant. Under the parol evidence rule, no oral understanding to keep any of the drafts separate and apart is admissible to contradict the provisions of the agreement.

And if the drafts in litigation were not under the acceptance contract the authorities unanimously hold that any agreement to waive a banker's lien must be positive and definite, if it is to be effective. Appellant respectfully submits that the cases of special deposit or deposits in trust cited by the trial Court have no bearing here. If it was a trust, what was it for? If it was a specific deposit, what was it for? The mere deposit for collection does not create a special deposit or a trust. Numerous cases have hereinbefore been cited to the effect that drafts and other documents deposited for collection are subject to banker's lien and setoff. Furthermore, if there is any uncertainty in the language used by Mr. Hall, it is the uncertainty of Mr. Hall and Richfield, and upon them must fall the burden of the loss.

The facts in the fairly recent case of *Updike v. Oakland Motor Car Co.* (supra) are far stronger in support of a waiver of right of offset than in the case at bar, but notwithstanding, the Court held against the waiver of setoff because it was not *definitely* expressed, stating:

> "An agreement must be clear and specific to deprive a party of the ordinary right of setoff."

The case of *American Surety Company v. Bank of Italy* (supra) is also controlling in its holding that before the ordinary relations of a bank and its depositor will be deemed changed, the agreement to that effect must be specific and unambiguous.

Similarly, too, the argument that subsequent to the appointment of the receiver there was a waiver of appellant's rights, falls not alone upon the facts but upon the law itself. The presumption is as strong against a subsequent waiver as against a prior waiver of lien. Language must of course be given its normal interpretation, and so say the cases. The relinquishment of part of the proceeds has no legal effect whatsoever, nor has the filing of the claims as unsecured in the receivership proceedings. Furthermore, a waiver must amount to a contract supported by consideration, and none has here been shown. Nor is appellant estopped as against the receiver in this action, assuming that the telegrams have the full effect which counsel seek to give them. The receiver does not represent Richfield's creditors with respect to their alleged rights originating *subsequent* to the receivership, or as to their rights as against each other.

From the time of the appointment of the receiver, the appellant bank sought to act in such a way as to be fair, both to the receiver and to its own depositors and stockholders. Thus it cooperated with the receiver to the extent of returning to him over $40,000.00 in bank balances and approximately $35,000.00 of draft proceeds. If it be the law that appellant must suffer because it cooperated to the extent of

more than $75,000.00, then the law attaches a heavy penalty to cooperation. It is submitted that such is not the law.

Whether the drafts be considered as deposited under the agreement and subject to its express terms, or whether they be considered as deposited for collection only and subject to appellant's right of banker's lien and setoff, the answer is the same,—appellant may retain the proceeds of the drafts which are the subject of this litigation and apply them against the past due general indebtedness of Richfield Oil Company of California to it. This answer compels the reversal of the judgment of the trial Court.

Dated, San Francisco,
March 5, 1934.

Respectfully submitted,
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